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In The

Supreme Court of the United States

October Term, 1991

BOARD OF GOVERNORS OF
STATE COLLEGES AND UNIVERSITIES,

Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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June 1, 1992

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QUESTION PRESENTED FOR REVIEW

Whether a collective bargaining agreement provision violates Section 4(d) of the Age Discrimination in Employment Act (29 U.S.C. §623[d]) by providing that the Employer need not proceed further with the processing of a grievance if the grievant seeks resolution of the disputed matter in any other forum.

LIST OF PARTIES

The parties before the Court are:

Board of Governors of State Colleges and Universities, Petitioner,

Equal Employment Opportunity Commission, Respondent,

The parties in the Court whose judgment is sought to be reviewed (the United States Court of Appeals, Seventh Circuit) also included, as a defendant-appellee:

University Professionals of Illinois

As stated by the Court of Appeals, this union defendant was neutral in the proceeding, but, of course, is bound by the decision in that Court, and its interest would be affected by the decision of this Court. (957 Fed.(2d) at 426, n.1; App. at 1)

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No. _____

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BOARD OF GOVERNORS OF
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Petitioner,

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EQUAL EMPLOYMENT
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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Board of Governors of State Colleges and Universities ("the Board"),[1] respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals of the Seventh Circuit ("the Seventh Circuit") to review a judgment reversing the judgment

[1] In compliance with Rule 29.1, Rules of the Supreme Court of the United States, Board of Governors states that it is not a corporation having any parent or subsidiary companies.

issued by the United States District Court for the Northern District of Illinois, Eastern Division, in Case No. 86 C 295 (Judge Marvin E. Aspen), which had granted summary judgment to the Board.

OPINIONS BELOW

The Seventh Circuit's opinion was reported at 957 F.2d 424 (7th Cir. 1992, App. at 1).

The decision of the United States District Court for the Northern District of Illinois (Judge Aspen) granting summary judgment to the Board from which the Equal Employment Opportunity Commission appealed was reported at 735 F. Supp. 888 (N.D. Ill. 1990, App. at 20).

Another decision by the same District Court (Judge Aspen), denying the EEOC's motion for a partial summary judgment on the issue of liability, was reported at 706 F. Supp. 1377 (N.D. Ill. 1989, App. at 29).

An earlier decision by the same Federal District Court (Judge Getzendanner) denying the Board's motion to dismiss was reported at 665 F. Supp. 630 (N.D. Ill. 1987, App. at 51).

A copy of each opinion appears in the Appendix hereto.

JURISDICTION

On March 3, 1992, the Court of Appeals for the Seventh Circuit entered its judgment reversing the judgment of the United States District Court for the Northern

District of Illinois, Eastern Division, which had granted summary judgment to Board of Governors, petitioner here. The Court of Appeals remanded the cause for entry of appropriate injunctive relief in favor of the EEOC, respondent here.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Jurisdiction of the Seventh Circuit Court of Appeals was pursuant to 28 U.S.C. §1291. Jurisdiction of the District Court was pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§216(c) and 626(b), and 28 U.S.C. §§1331, 1337, 1343, and 1345.

STATUTORY PROVISIONS INVOLVED

The EEOC alleged a violation of Section 4(d) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §623(d), which provides:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

STATEMENT OF THE CASE

The Board is the governing body for a system of five state colleges and universities, together with such additional colleges and universities which might in the future be designated as State Colleges and Universities. (Ill. Rev. Stat. Ch. 144, ¶¶ 1001-1017)

The EEOC filed this suit in January of 1986, complaining that Article 17.2 of the collective bargaining agreement between the Board and the University Professionals of Illinois (a labor organization representing academic employees of the Board), violated Section 4(d) of the ADEA. This provision of the collective bargaining agreement provides, in relevant part:

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

An affidavit of the Chancellor of the Board, Thomas D. Layzell, states that the purpose of the clause was to avoid duplicating time, effort, and money by having to participate in two proceedings involving a single matter and to avoid the possibility of inconsistent results if the matter were processed both in an arbitration proceeding and in another forum. As found by the District Court, this evidence offered through Mr. Layzell's affidavit was not controverted by the EEOC (706 F. Supp. at 1386, App. at 48-49).

It seems unnecessary to trace the details of the various decisions on the motions of the parties which preceded the grant of summary judgment to the Board on May 2, 1990 (735 F. Supp. 888, App. at 20). That was the decision presented to the Seventh Circuit for review, and the Seventh Circuit decision (957 F.2d 424, App. at 1) deals with all of the central issues in the case.

The Court of Appeals held that Article 17.2 of the collective bargaining agreement was a retaliatory policy constituting a *per se* violation of Section 4(d). It so held because it found that the allegedly offending clause took away a contractual right of access to the union contract's grievance and arbitration procedure "for the sole reason that the employee has engaged in protected activity (filing an ADEA claim)" (957 F.2d at 430, App. at 12).

The Court also rejected the District Court's ruling that the Board had acted in good faith and therefore could not logically be held to have retaliated against an employee. (The District Court had relied for this holding on *Rose v. Hearst Magazines Div., Hearst Corp.*, 814 F.2d 491, 493 [7th Cir. 1987]).[2]

The Court of Appeals distinguished the *Rose* case factually and also on the ground that Rose was an individual disparate treatment case, whereas the Court found this case to be one involving an allegedly discriminatory policy. In a footnote the Court seemed also to question the reasoning of Rose. citing two rejections of the *Rose*

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[2] For the District Court's discussion of the impact of the Rose case, see 735 F. Supp. at 890-91, App. at 23-25.

rationale by other Courts of Appeal (957 F.2d at 429, n.7, App. at 10-11).

The Seventh Circuit then held that the policy here was discriminatory on its face because it denied a benefit (access to arbitration) on "an impermissible criterion (age or participation in protected legal rights) as a determining factor" thereby invalidating "the policy with respect to the protected class." (957 F.2d at 431, App. at 15.)

The Board asks that this Court grant certiorari to reconsider the Seventh Circuit's theory that the Age Discrimination in Employment Act guarantees employees access, not to alternative forums, but to duplicative forums for determining allegations of age discrimination. We urge the Court to adopt an interpretation of the ADEA which would guarantee only that an employee have access to the statutorily provided forum (EEOC investigation and federal court enforcement). But we urge the Court to find that employers and unions should be free lawfully to contract as to the extent to which their collectively bargained grievance and arbitration procedures may be available to employees who choose to utilize another forum to resolve the matter in issue.

REASONS FOR GRANTING THE WRIT

A. This Court Should Clarify Whether Section 4(d) of the ADEA Requires That Collectively Bargained Arbitration Provisions Guarantee Duplicative Forums for Deciding Discrimination Disputes

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an employee was entitled to resort to

the federal courts for resolution of a discrimination claim relating to his discharge, even though in an arbitration proceeding under the relevant collective bargaining agreement it had been held that his discharge had been for just cause. In the course of so holding, although focusing on the proposition that there can be no prospective waiver of an employee's Title VII rights, this Court spoke broadly about "a general intent to accord parallel or overlapping remedies against discrimination,"[3] and stated that a "claim to one forum does not preclude a later submission to another."[4] These general statements, however, were made in the context of deciding that access to federal courts to vindicate Title VII rights is a statutory right which may not be waived. The Court did not decide whether arbitral processes may be waived if an employee opts for invoking the jurisdiction of another tribunal, such as utilizing the statutory procedures for a discrimination dispute.

The instant case now squarely poses the issue of whether the arbitral forum may, by agreement between an employer and a union, be restricted to situations in which the employee does not institute an action in another forum for the purpose of resolving the dispute with the employer. The Seventh Circuit held here that the collective bargaining parties may not thus restrict the availability of arbitration. This decision, when taken in conjunction with *Alexander v. Gardner-Denver,* would thus

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[3] *Id.* at 47.

[4] *Id.* at 48.

mandate the availability of duplicative forums in ADEA cases, and presumably in all employee-employer civil rights disputes.

In recent decisions such as *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647, 55 Fair Empl. Prac. Cases (BNA) 1116 (1991),[5] this Court appears to favor the resolution of discrimination disputes in only one forum – that being arbitration – when the parties have so agreed. We recognize that in *Gilmer* the Court distinguished, rather than overruled, *Alexander v. Gardner-Denver* and its progeny.[6] This Court observed that "those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims" and that in cases arising in a collective bargaining context there is a "tension between collective representation and individual statutory rights." (*Gilmer*, 111 S. Ct. at 1657, 55 Fair Empl. Prac. Cas. (BNA) at 1123.)

Neither in *Gilmer* nor in any other case, so far as our research reveals, has this Court ever dealt with the converse issue of whether the parties to a collective agreement may agree to make the Title VII and ADEA forum the exclusive forum, once an employee has resorted to

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[5] See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 *reh'g denied*, 483 U.S. 1056 (1987); *Rodriguez de Quihas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989).

[6] *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

that statutory forum. Here the agreement between the employer and the union had that effect, because it allowed exclusion from the arbitral process of a matter which the employee has already decided to submit to an administrative or judicial forum. In this case, the Seventh Circuit has held that such an agreement is unlawful, thus in effect mandating the availability of duplicate forums for discrimination disputes.

Prior to the decision of the Seventh Circuit in this case, such exclusions have been found lawful in some other jurisdictions – although not in another United States Court of Appeals. *Board of Higher Education of the City of New York v. Professional Staff of Congress/CUNY*, 362 N.Y.S.2d 985, 21 Fair Empl. Cas. (BNA) 125 (Sup. Ct. 1975); *Kumar v. Board of Trustees of the Univ. of Mass.*, 566 F. Supp. 1299 (D. Mass. 1983), *rev'd on other grounds*, 774 F.2d 1 (1st Cir. 1985), *cert. denied* 475 U.S. 1097 (1986); and *Gold v. Gallaudet College*, 630 F. Supp. 1176 (D.D.C. 1986).

The Seventh Circuit's mandating of dual forums poses serious problems and may, as pointed out by the reluctantly concurring Judge Manion, have most regrettable results. As he said:

> Now the Union member will be permitted to operate in two forums and presumably take the best deal. But the Board [the Employer here] may see no benefit in doubling its exposure and adding to the costs of its administrative and legal defense. Thus it could conclude that if court action must be an alternative, it would be the only alternative. It seems to me that this rigid result was not really the goal of our federal laws against discrimination. (957 F.2d at 432, App. at 19.)

Judge Manion, however, concurred because he believed the result to be compelled by §4(d) of the ADEA.

This Court should reanalyze whether duplicative forums are required by Section 4(d). There are well founded arguments that Section 4(d) neither compels nor even justifies such an interpretation. Indeed, we believe that to compel such dual forums is not an interpretation consistent with the intent and purpose of either the ADEA (29 U.S.C. §§621-634) or of Title VII (42 U.S.C. §2000e).

For all of these reasons we respectfully submit that the issue of whether such dual forums are *compelled*, rather than, as held in *Alexander v. Gardner-Denver, supra*, merely *permitted*, is an issue which should be clarified by this Court. For this reason alone, we suggest that a writ of certiorari may providently be issued in this case.

B. An Important Issue For Consideration By This Court is the Unwarranted Tension Between the National Labor Relations Act and the ADEA Created By the Seventh Circuit's Interpretation of the ADEA

Under the National Labor Relations Act and the state Labor Relations Act to which the Board here is subject (The Illinois Educational Labor Relations Act, Ill. Rev. Stat., ch. 48, ¶¶1701-1721), the grievance and arbitration processes are matters which are subject to collective bargaining. *NLRB v. United Nuclear Corp.*, 381 F.2d 972, 976-78 (10th Cir. 1967), (finding a unilateral change in grievance procedures to be a violation of the employer's

bargaining duty not to make such changes in the "working conditions which are the mandatory subject of collective bargaining"); *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 620 (3rd Cir.), *cert. denied*, 375 U.S. 984 (1963) ("We agree with the Board that both seniority rights and a grievance procedure are within the phrase 'wages, hours and other terms and conditions of employment' and hence are mandatory bargaining subjects"); *United Electrical, Radio and Machine Workers v. NLRB*, 409 F.2d 150, 156 (D.C. Cir. 1969) (" . . . the case law shows that grievance arbitration, and no-strike clauses are mandatory subjects for bargaining").

Under both federal law and the Illinois Act, through bargaining the parties may lawfully define the scope and application of their contractual grievance and arbitration procedures. Those grievance and arbitration rights are, as this Court has held, "an integral part of the collective bargaining process." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Clayton v. United Automobile, Aerospace & Agricultural Implement Workers*, 451 U.S. 679, 686-87 (1981); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). Such rights may lawfully be created, limited, or waived through collective bargaining, although demands for certain waivers may be only permissive, rather than mandatory subjects of bargaining.[7]

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[7] See, e.g., *Latrobe Steel Co.*, 244 NLRB 528 (1979), *enf'd as modified*, 630 F.2d 171 (3rd Cir. 1980), *cert. denied*, 454 U.S. 821 (1981), and *Litton Financial Printing v. N.L.R.B.* ___ U.S. ___, 111 S. Ct. 2215 at 2222. ("We reaffirm today that under the NLRA

(Continued on following page)

This Court has repeatedly held that unions may agree with an employer to waive even certain NLRA statutory rights, such as the right to strike and the right to be free of discrimination under the National Labor Relations Act (*Metropolitan Edison Co. v. NLRB, supra,* at 705).

While an employer and a union presumably may not lawfully waive individual ADEA or Title VII rights, the right of the parties to agree to waive or limit their own contractually created grievance and arbitration procedures is, as documented above, clearly established under the NLRA (and, consistent with federal law, under the Illinois Educational Labor Relations Act).

A decision such as this should not be allowed to stand when it is contrary to well established National Labor Relations Act precedent. If an employer and union seek to agree on a waiver of the right of an employee to invoke *statutory* forums guaranteed to the employee under ADEA or under Title VII, such a waiver would be invalid – at least unless this Court were to reconsider *Alexander v. Gardner-Denver Co.* in such a way as to permit arbitration to be an effective substitute for the statutory processes.

(Continued from previous page)

arbitration is a matter of consent, and that it will not be imposed upon the parties beyond the scope of their agreement.") Under the Illinois Educational Labor Relations Act, a clause requiring the exclusion of a mandatory bargaining subject from the contractual binding arbitration clause is a permissive, not a mandatory, subject of bargaining. *Alton Community Unit School Dist. v. IELRB,* 209 Ill.App.3d 16, 28, 567 N.E.2d 671, 678 (1991).

That case has created tension between the collective bargaining laws and the antidiscrimination laws because it has led the industrial relations community to doubt whether it is fruitful to negotiate antidiscrimination clauses which are to be interpreted and applied under their contractual grievance and arbitration machinery, since that process can be rendered a nullity by a Federal District Court proceeding. Nevertheless, this Court found it necessary to permit an employee to resort to the federal judiciary for adjudication of a Title VII claim, even though the dispute had already been arbitrated. The Court did this to protect the statutory scheme for enforcement of the antidiscrimination laws. But we respectfully submit that this Court should consider whether it follows that a *de facto* guarantee of duplicative forums is so vital a right under Title VII that the courts must impinge upon the normal bargaining rights of companies and unions. The parties' NLRA right to decide upon the appropriate scope and limitations thereon of their grievance and arbitration procedures should not be forfeited in the name of ADEA or Title VII. The tension which the Seventh Circuit has created between NLRA rights and ADEA and Title VII rights presents a significant federal question which should be resolved by this Court.

For this reason too, we submit that this case is worthy of a writ of certiorari.

C. The Rationale of the Seventh Circuit Is in Conflict with that of the Fifth Circuit. and This Court Should Resolve That Conflict

The Seventh Circuit found that the collective bargaining contract clause here in issue violated Section 4(d) "because it is discriminatory on its face" (957 F.2d at 431, App. at 17). By its terms, the clause contains no references to the filing of ADEA or Title VII charges with the EEOC. Instead the clause permits the exclusion from grievance and arbitration procedures of any dispute of any kind of which the employee seeks resolution in an administrative or judicial forum.

We have argued throughout this proceeding that such an exclusion is nondiscriminatory and instead is aimed solely at preventing duplicative litigation of all types of employee-employer disputes and at preventing potentially inconsistent decisions which can result from duplicative litigation. It has been our consistent position that arbitration is, and should be, an *alternative* dispute resolution procedures, not a *duplicative* dispute resolution procedure, and that to implement that underlying premise of collectively bargained grievance and arbitration procedures is a salient, nondiscriminatory purpose – not one to be condemned as "retaliatory."

The EEOC has argued – and did so successfully in the Seventh Circuit – that the fact that the policy permits exclusion of disputes which are submitted to the EEOC by ADEA claimants necessarily makes the policy discriminatory under §4(d), as being retaliatory against age discrimination claimants. To our argument that it is not so aimed but instead is aimed at all potential for duplicative

forums, the EEOC argues, and the Seventh Circuit agrees, that we were arguing merely that discrimination against a protected group does not become nondiscriminatory because members of other groups are also included in the group adversely affected by the policy. The Seventh Circuit compares this policy to one which would ban the hiring of anyone over 35 years of age, analogizing our argument to one which would claim such a policy to be lawful because it adversely affected not only the protected age group but also an unprotected group of individuals between the ages of 35 and 40 (957 F.2d at 430-31, App. at 14-15).

Analogies, as we all know, are frequently dangerously unreliable. We could counter, for example, by posing a hypothetical policy providing that employees testifying in any litigated proceeding would not receive their regular wages for time spent away from work while testifying. Clearly this policy would have an adverse effect by causing a loss of a benefit (wages) by persons who testify in discrimination proceedings. Under the EEOC's argument, then, apparently such a policy would be retaliatory and unlawful, and could not be defended merely because "unprotected" employees testifying in other types of proceedings would also not receive wages. The flaw in this analysis, as in the one utilized by the EEOC and the Seventh Circuit, is that the employees were adversely affected when testifying in any proceeding not because of a discriminatory purpose, but *because they did not work*. That is a *lawful purpose*, and therefore such a policy would obviously be nondiscriminatory.

Similarly, persons affected by the policy here at issue were adversely affected not for an unlawful discriminatory purpose, but for the *lawful purpose of avoiding duplicate forums,* not just for those who invoked a duplicate forum for discrimination disputes, but for those who did so for any dispute.

We do not wish to belabor the argument further at this time because this is not intended as a brief directed at the merits. We mention it, however, because it is precisely the same kind of argument which the EEOC made to the Fifth Circuit in *EEOC v. J. M. Huber Corp.*, 927 F.2d 1322, *reh'g denied,* 942 F.2d 930 (5th Cir. 1991). There the issue was whether a policy was retaliatory and discriminatory. The policy provided for withholding distributable retirement benefits when employees challenged their termination by filing legal actions (including discrimination charges) and sought reinstatement. The evidence then showed that the purpose of the withholding was to preserve the tax-qualified status of the benefit plan under ERISA. Nevertheless, the EEOC contended, as here, that since the employer withheld a benefit from persons filing discrimination charges, it was a retaliatory, discriminatory policy and was unlawful.

The Fifth Circuit pointed out that since benefits were withheld routinely for a *lawful purpose* and were withheld from all severed employees who contested severance for any reason, not merely those whose contests were based on federal antidiscrimination laws, the policy was *not* discriminatory on its face.

The Fifth Circuit distinguished this Court's decision in *United Automobile, Aerospace and Agricultural Implement Workers v. Johnson Controls, Inc.*, ___ U.S. ___, 111 S. Ct. 1196 (1991), upon which the EEOC there relied, as it did

here. It pointed out that in *Johnson Controls*, the exclusion of employees from jobs involving lead exposure was aimed, not at fertile persons whether male or female, but instead only at *female* fertile persons, thus being aimed directly at a gender-based group. Had the policy in *Johnson* been aimed at both fertile men and fertile women, then, if we understand this Court's opinion correctly, it would have been lawful, even though it did have adverse effects on members of a protected group as well as on members of an unprotected group. But the policy in *Johnson* was aimed at, and had adverse effects on, only a protected group. That was not the situation which the Fifth Circuit found to exist in *J. M. Huber*, and it is not the situation in this case.

Thus the rationale of the Fifth Circuit in *J. M. Huber* is at odds with the rationale of the Seventh Circuit in this case, and this conflict needs to be resolved. The conflict is as to the legality of a policy having a lawful purpose, and which may impact on a protected group, but which does not single out discriminatorily for adverse effects the members of a protected group. Is such a policy facially discriminatory and retaliatory solely because it may have an adverse effect on persons both within and without a protected group?

While we would argue that, as the Fifth Circuit held, such a policy is not unlawful, there now exists a significant conflict between the Fifth and Seventh Circuits on a significant issue as to the proper interpretation of this country's antidiscrimination laws.

We urge that this conflict warrants the issuance of a writ of certiorari.

CONCLUSION

There is presented in this case an important question of federal law which has not been, but should be, settled by this Court; i.e, whether collectively bargained arbitration provisions must guarantee duplicate forums for resolving discrimination issues. The decision of the Seventh Circuit raises another significant federal question; i.e., whether the Seventh Circuit decision creates a significant (and, we submit, unnecessary) tension between two major national employment laws. The Seventh Circuit's decision here is in conflict with a decision of the Fifth Circuit with respect to a significant federal question of interpretation of the federal antidiscrimination laws. We respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Board of Governors of
State Colleges and Universities

June 1, 1992

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES and University Professionals of Illinois, Defendants-Appellants.

No. 90-2440.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 31, 1991.

Decided March 3, 1992.

As Amended March 3, 1992.

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Resource Management and Mid-America Legal Foundation.

Jill A. Goldy, James Baird, Krista S. Kaplan, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Ill., for National Public Employer Labor Relations Ass'n, Illinois Public Employer Labor Relations Ass'n.

Before CUMMINGS and MANION, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

CUMMINGS, Circuit Judge.

The Equal Employment Opportunity Commission ("EEOC") brought this action to challenge the legality of a collective bargaining agreement provision that denies employees their contractual right to a grievance proceeding whenever the employee initiates a claim, including a claim of age-based discrimination, in an administrative or judicial forum. The policy in question was adopted pursuant to a collective bargaining agreement between the Board of Governors of State Colleges and Universities ("Board"), an agency or instrumentality of the State of Illinois, and University Professionals of Illinois ("Union").[1] Under the collective bargaining agreement, when an employee files a charge or initiates a lawsuit the Board is authorized to halt existing or future grievance proceedings. The EEOC maintains that this policy violates Section 4(d) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d), which forbids

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[1] As revealed in its appellate brief, the Union is neutral with respect to the merits of the case but will "agree to any change of contract required by a Court order in this case" (Br. 3). Our disposition of this case is binding as to the Union as well as to the Board.

discrimination against employees who have filed a charge, complaint or lawsuit under the ADEA. Accordingly, the EEOC has sought to enjoin the Board from enforcing its policy against employees who have filed charges or complaints under the ADEA. With much hesitation, the district court granted summary judgment for the Board on the basis of this Court's decision in *Rose v. Hearst Magazines Div., Hearst Corp.*, 814 F.2d 491 (7th Cir.1987). On appeal, this Court assumes jurisdiction under 28 U.S.C. § 1291. For the following reasons, we reverse.

I.

Article 17.2 of the collective bargaining agreement between the Board and the Union ("Article 17.2") provides:

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

The EEOC contends that the Board's policy deprives ADEA claimants of a term or condition of employment and deters employees from exercising their rights under the ADEA. Because the provision prevents an employee from pursuing his grievance with the Board if he wishes to file a charge with the EEOC, it assertedly violates Section 4(d) of the ADEA ("Section 4(d)"), which provides:

> It shall be unlawful for an employer to discriminate against any of his employees * * * because such individual, members or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

This lawsuit resulted in three district court opinions which are reported at 665 F.Supp. 630 (1987), 706 F.Supp. 1377 (1989), and 735 F.Supp. 888 (1990). The EEOC has dubbed them *BOG I*, *BOG II*, and *BOG III*, referring to the defendant Board of Governors. We adopt this nomenclature.

BOG I revealed that on April 9, 1984, Professor Raymond Lewis filed a grievance with the Union because the Northeastern Illinois University president had decided not to recommend Lewis for tenure, allegedly in violation of University procedure. Lewis's grievance claim took more than a year to process, and an arbitration hearing was set for May 20, 1985. Although he was reluctant to do so, the EEOC encouraged Lewis to file an age discrimination claim with the Commission. He filed such a claim on May 14, 1985. As he feared, this caused the Board to terminate his pending grievance under the above-quoted provision of the collective bargaining agreement, thus blocking the completion of pending arbitration of Lewis's tenure dispute under the collective bargaining contract. The board instructed the arbitrator in the grievance procedure not to render a decision regarding Lewis's claim even though the arbitration hearing had concluded before the Board had learned of his EEOC claim. The Board's

actions prompted the EEOC to bring the present case.[2] Former Judge Getzendanner held that the above-quoted provision of the collective bargaining agreement constituted a prima facie case of forbidden retaliation under Section 4(d) of the ADEA, so she denied the Board's motion to dismiss the complaint. She also concluded that an employer's contractual right not to arbitrate certain cases is subservient to employee rights under Title VII of the Civil Rights of 1964 ("Title VII") and the ADEA.

After Judge Getzendanner resigned from the judiciary, the case was assigned to Judge Aspen for further processing that resulted in *BOG II*. In that opinion the court denied the EEOC's motion for partial summary judgment on the issue of liability. The district judge first held that the Eleventh Amendment did not bar ADEA claims against the Board and refused the Board's request to stay the litigation because five settlement conferences with a magistrate judge had failed. Nether of these rulings has been challenged on appeal. The district court judge also refused to grant the EEOC's motion for partial summary judgment. In reaching his conclusion, Judge Aspen questioned both the reasoning and holding in *Rose v. Hearst Magazines Div., Hearst Corp.*, 814 F.2d 491 (7th

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[2] After the EEOC threatened litigation, the Board reinstated Lewis's grievance proceeding. However, the Board's decision to reinstate the proceeding does not save Article 17.2 from judicial scrutiny. Article 17.2 has been employed against three other Board employees who filed charges or complaints of discrimination, and whose grievance proceedings were terminated according to the challenged policy. Moreover, the Board has not modified the policy to exclude future ADEA claimants.

Cir.1987), but felt constrained to follow dicta in that case. He therefore denied the EEOC's motion for summary judgment on the ground that the Board had raised a genuine issue concerning its good faith in adopting Article 17.2.

In *BOG III* the parties presented cross-motions for summary judgment. There Judge Aspen concluded that Article 17.2 was not invalid in the absence of evidence that the provision was adopted with intent to retaliate. There being no such evidence, summary judgment was granted for the Board.[3] 735 F.Supp. at 890-891. Because we disagree that the *Rose* case requires such a result, we reverse.

II.

Section 4(d) makes it unlawful for an employer to discriminate against an employee because he participated in an investigation, proceeding or litigation under the ADEA. Even though the explicit language in Section 4(d) prohibits "discrimination," this Court has referred to Section 4(d) claims as "retaliation" claims. Despite the Board's suggestion to the contrary, we do not distinguish the two terms because retaliation claims require proof of a greater level of animus than that required in discrimination claims. Instead, we use the terms as a shorthand way to distinguish substantive age discrimination claims from

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[3] Two briefs have been filed by *amici curiae* urging affirmance. The first was for the Illinois Chamber of Commerce and the Society for Human Resource Management. The second was for the National Public Employer Labor Relations Association and the Illinois Public Labor Relations Association.

claims of discrimination based on the exercise of legal rights granted by the ADEA.[4] This shorthand characterization of discrimination claims and retaliation claims does not transform Section 4(d) into a narrower prohibition than that suggested by its statutory language. Nothing in Section 4(d) requires a showing of intent in retaliatory policy cases.

To the contrary, Section 4(d) is concerned with the effect of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates. Section 4(d) explicitly prohibits discrimination against employees who engage in protected activity. When charged with unlawful retaliation in violation of Section 4(d), an employer may offer a legitimate non-discriminatory reason for taking an adverse action against an employee who has engaged in protected activity, *i.e.*, that the employer took the adverse action for some reason unrelated to the employee's participation in protected activity. However, the employer may not proffer a good faith reason for taking retaliatory action. For example, the Board's asserted justification for Article 17.2, avoiding duplicative litigation, does not rebut the claim that the Board discriminated against employees who engaged in protected activity. Rather the Board's

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[4] There is no necessity to employ the term retaliation rather than discrimination when addressing Section 4(d) claims. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (discussing "discrimination" under Section 704(a), Title VII's parallel provision to Section 4(d), even though courts routinely characterize Section 704(a) claims as retaliation claims). Consequently, we use these terms interchangeably.

justification alleges that non-malicious discrimination against employees ought not be legally prohibited. It is not for this Court to determine when retaliation is permissible. Congress already resolved that issue when it determined that "[i]t shall be unlawful for an employer to discriminate against any of his employees * * * because such individual * * * has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d). Notably, Congress chose not to enact any affirmative defenses to a charge of retaliation, 29 U.S.C. § 623(f), and did not provide an exception to Section 4(d) when such discrimination would be rational or financially prudent.

It is immaterial that an employee might have overlapping contractual and legal remedies. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974). In *Alexander* the Supreme Court observed that Congress intended to provide parallel and overlapping remedies against discrimination and specifically stated that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII."[5] If the Board wants to lobby for a benign

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[5] This is particularly true where, as here, the contractual and legal proceedings involve different claims. *Id.* at 49, 94 S.Ct. at 1020. Lewis's grievance dispute concerns the Board's failure to adhere to its established tenure procedure. However, his EEOC claim alleges age discrimination.

discrimination exception to Section 4(d), its appeal would be appropriately directed to Congress rather than this Court.

When an employee's participation in statutorily protected activity is the determining factor in an employer's decision to take adverse employment action, that action is invalid, regardless of the employer's intent. If the employer's differential treatment of its employees is impermissible, the policy which provides for its differential treatment is invalid regardless of the employer's motivation for adopting or invoking the policy. Hence the Board's asserted good faith in discriminating against employees who file claims in administrative and judicial forums is entirely irrelevant.[6]

This Court's decision in *Rose v. Hearst Magazines Div., Hearst Corp.*, 814 F.2d 491 (1987), does not require a contrary conclusion. *Rose* concerned a jury verdict within ADEA's two-tier liability scheme. There the jury found that the employer had retaliated against its employee but

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[6] Although a showing of willfulness is relevant to the second tier of damages under the ADEA, good faith may not even be relevant in that context. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), the Supreme Court said that "a violation is 'willful' if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 128, 105 S.Ct. at 625. That standard also applies in this Circuit, *Coston v. Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988) (overruling the "knew or should have known" standard set forth in *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981)). According to this standard the defendant may allege that it believed its policy was lawful, not that the purposes it policy sought to serve were benign.

found that such retaliation was not willful. This Court considered those two findings inconsistent and in dicta noted "[i]f [the employer] acted in good faith, it cannot logically be held to have retaliated against Rose." *Id.* at 493. In *Rose* we required the jury to find both retaliation and willfulness or neither – not because the ADEA's two-tier damages proceeding is only a one-tier procedure in cases of retaliation, but because of the particular facts in the *Rose* case. There the employer "angrily chastised" the employee for filing an age discrimination claim and suspended him at that same meeting. *Id.* at 492. Under these circumstances, if the employer in *Rose* retaliated against its employee, the employer's flagrant conduct must also have amounted to reckless disregard for whether its conduct violated the ADEA. Retaliation claims in disparate treatment cases present the same dilemma of determining two-tier ADEA liability as disparate treatment claims. See *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1066 (7th Cir.1989) (discussing difficulty of applying ADEA's two-tier structure to discrimination cases alleging disparate treatment).

Moreover *Rose*, which concerned an individual-disparate-treatment case, has been questioned in that context[7] and we decline to extend its rationale to this case

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[7] *Rose* has been rejected by two other courts of appeals (*Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1571 (2d Cir.1989) (holding that a finding of retaliation may also result in a finding of willfulness, but need not do so in every case); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 636 (10th Cir.1988) (Rejecting the view that "a finding against willfulness cannot consistently stand with a jury finding of intentional discrimination"), and indeed has been questioned here (*Coston*

(Continued on following page)

which concerns a discriminatory policy. In discriminatory policy cases the employer's reasons for adopting the challenged policy are irrelevant to the policy's legality. *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1065-1066 (7th Cir.1989) ("In a *Thurston*-type case, the factfinder can determine whether the plan or policy at issue is discriminatory without any inquiry into the defendant's state of mind."). As explained in another ADEA case, "if [the employer] stopped providing [the employee] benefits to which he was otherwise entitled simply because he filed a charge, the company would be guilty of retaliation." *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1089 (5th Cir.1987).[8]

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v. Plitt Theatres, Inc., 831 F.2d 1321, 1338 n. 1 (7th Cir.1987) (Manion, J., concurring), vacated on other grounds, 486 U.S. 1020, 108 S.Ct. 1990, 100 L.Ed.2d 223 (1988), (finding no reason to impose single-tier liability in retaliation cases)).

[8] The Fifth Circuit seems to have reached a holding inconsistent with *Cosmair* in *EEOC v. J.M. Huber Corporation*, 927 F.2d 1322, rehearing denied, 942 F.2d 930 (1991). However, that case does not involve the ADEA. Moreover, the *Huber* opinions deny any inconsistency with *Cosmair*. 927 F.2d at 1326-1327, 942 F.2d at 931-932. In any event, *Huber* is inconsistent with the Supreme Court's holding in *International Union, UAW v. Johnson Controls, Inc.*, ___ U.S. ___, 111 S.Ct. 1196. There the Court held that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." ___U.S. at ___ - ___, 111 S.Ct. at 1203-1204. To the extent that there is any inconsistency between *Cosmair* and *Huber*, we prefer the approach taken by Chief Judge Clark in *Cosmair*.

In a retaliatory policy case an employer's alleged good faith is irrelevant, just as evidence of good faith has been held to be irrelevant in a case involving a discriminatory policy. As noted in *International Union, UAW v. Johnson Controls,* this Court had erroneously "assumed that because the asserted reason for the sex-based exclusion * * * was ostensibly benign, the policy was not sex-based discrimination. That assumption, however, was incorrect." ___ U.S. ___, 111 S.Ct. 1196, 1203, 113 L.Ed.2d 158(1991). Similarly, in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 129, 130, 105 S.Ct. 613, 621, 625, 626, 83 L.Ed.2d 523 (1985), the defendant's transfer policy was held to violate the ADEA even though the defendant was attempting to bring its policy into compliance with the ADEA and even though it "acted reasonably and in good faith." See also *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 737-739, 101 S.Ct. 1437, 1443-1444, 67 L.Ed.2d 641 (1981).

Having concluded that a retaliatory policy constitutes a *per se* violation of Section 4(d), we now examine whether Article 17.2 of the collective bargaining agreement is a retaliatory policy with respect to ADEA claimants. Under the collective bargaining agreement between the Board and the Union, an employee has a contractual right to an in-house grievance procedure. However, an employee loses that right if he files a charge of discrimination. Article 17.2 authorizes the Board to take an adverse employment action (termination of the in-house grievance proceeding) for the sole reason that the employee has engaged in protected activity (filing an ADEA claim). Under Article 17.2 an employee must forfeit his contractual right to a grievance proceeding, a

condition of his employment, or surrender his legal right to participate in litigation under the ADEA. Conversely, an employee who elects to pursue his grievance with the Board may lose his right to bring his federal age discrimination claim. This is particularly evident in the present case, where the Board's grievance procedure took more than a year to reach the arbitration state. Had Lewis decided to pursue his contractual remedies but ultimately found that resolution unsatisfactory, he might nevertheless have been barred from initiating his ADEA claim by the statute of limitations. 29 U.S.C. § 626.

The Board itself admits that Article 17.2 permits an employee to elect "either avenue of relief but not both" (Br. 9). The Board claims that an employee's loss of his contractual right to a grievance procedure is non-problematic because the employer had no obligation to provide its employees with a right to grievance procedures at all. However, in *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), the Supreme Court held that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free * * * not to provide the benefit at all." *Id.* at 75, 104 S.Ct. at 2234. Although the Board would be free not to provide grievance proceedings, the "participation clause" of Section 4(d) prohibits the employer from providing grievance proceedings only if an employee refrains from participating in activity that is protected under the ADEA. By inserting Article 17.2 in the collective bargaining agreement, the Board adopted a policy which impermissibly discriminates against employees who file ADEA complaints. Therefore, as previously discussed, the

Board's supposedly benign motivation for adopting the policy is irrelevant.

The Board challenges the characterization of its policy as discriminatory since Article 17.2 does not apply solely to employees who bring protected discrimination claims.[9] Instead, it applies to any employee who brings an employment-related action in a judicial or administration forum. In support of its argument, the Board notes several types of unprotected activity that would also lead to adverse employment action. For example, an employee's decision to file a contract claim in a judicial forum would subject him to termination of his grievance proceeding.

However, the fact that an employer can deny grievance proceedings on the basis of participation in unprotected activity is entirely irrelevant. The Board may not deny grievance proceedings on the basis that employees have filed protected ADEA claims. A policy is discriminatory when it discriminates against members of a protected class on the basis of an impermissible factor. *Trans World Airlines v. Thurston*, 469 U.S. 111, 124, 105 S.Ct. 613, 623 (holding that "TWA's transfer policy discriminates against protected individuals on the basis of age, and thereby violates the [ADEA]"). The EEOC offered the following example of the principle that a discriminatory policy is no less so with respect to the protected class because non-protected persons are also

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[9] Although this case exclusively concerns statutorily protected claims of age discrimination, an employee also enjoys statutory protection against retaliation when filing discrimination claims under Title VII. See 42 U.S.C. § 2000e-3(a).

adversely affected by the policy: a company adopts a policy which bans the hiring of anyone over 40 years of age. Clearly, that policy constitutes facial discrimination under the ADEA. *Id.* But if an employer enacts a policy that prohibits hiring anyone over 35 years of age, that policy would also constitute a discriminatory policy with regard to members of the protected class since all protected class members are excluded from employment because of age. It would be incongruous for us to accept the Board's approach that the second policy did not amount to a policy of age-based discrimination against individuals over 40 solely because the policy also adversely affected individuals between the ages of 35 and 40. The members of the protected class are equally excluded by the first policy and by the second, and under either policy the protected class suffers discrimination based on age. Likewise, if Article 17.2 authorized the Board to terminate grievance proceedings if and only if an employee filed an ADEA claim with the EEOC, that policy would be clearly discriminatory under Section 4(d). The contention that the policy is any less discriminatory when its scope is broadened is unpersuasive. Employees' rights under Section 4(d) would be as effectively stifled under either policy. Moreover, in either case members of the protected class would lose their right to grievance proceedings because they had filed ADEA claims.

In both the EEOC hypothetical and the case at bar, the use of an impermissible criterion (age or participation in protected legal rights) as a determining factor invalidates the policy with respect to the protected class. Furthermore, it would be inappropriate to suggest that each

member of the protected class file an individual-disparate-treatment claim pursuant to the *McDonnell Douglas Corp. v. Green*[10] burden-shifting method because the adverse employment action stemmed from a discriminatory policy, not an individual decision. Were we to adopt the Board's argument that a policy imposing adverse treatment on all members of a protected class was rendered non-discriminatory by the inclusion of some members outside the protected class, employers could consistently employ discriminatory criteria as long as they were careful to draw their discriminatory lines broadly enough to include members of a non-protected class.

III.

In sum, Section 4(d) prohibits policies that penalize employees who exercise their statutory rights under the ADEA. A collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA. Nor may the Board successfully argue that unions be permitted to waive an employee's rights under the ADEA, for it is well established that unions cannot waive employees' ADEA or Title VII rights through collective bargaining. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737-739, 101 S.Ct. 1438, 1443-1444; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 94 S.Ct. 1011, 1021; *Bartman v. Allis-Chalmers Corporation*, 799 F.2d 311, 315 (7th Cir.1986), certiorari denied, 479

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[10] 411 U.S. 792, 93 S.Ct. 1817.

U.S. 1092, 107 S.Ct. 1304, 94 L.Ed.2d 160 (1987); *EEOC v. County of Calumet*, 686 F.2d 1249, 1256-1257 (7th Cir.1982).[11]

To hold for the Board would allow it to deter its employees' exercise of their ADEA rights by imposing adverse employment consequences. Statutory provisions against retaliation such as those in the ADEA and Title VII protect employees' right to participate in protected activity and aid the work of the EEOC which depends upon employee cooperation. Cf. *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir.1969). Consequently, we fully agree with the conclusion in *BOG I* that Article 17.2 violates Section 4(d) with respect to ADEA claimants (665 F.Supp. at 637) because it is discriminatory on its face (*BOG II*, 706 F.Supp. at 1384 n. 9).

Reversed and remanded for entry of appropriate injunctive relief in favor of the EEOC.

MANION, Circuit Judge, concurring.

The collective bargaining agreement between the Board of Governors of State Colleges and Universities ("Board") and the University Professionals of Illinois ("Union") offered a grievance procedure for Union members. A grievance could involve issues related to the claimant's age, race, religion, color, national origin, or

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[11] While the Supreme Court recently held that ADEA claims may, in some circumstances, be subject to compulsory arbitration, it expressly distinguished cases occurring "in the context of collective bargaining agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S.Ct. 1647, 1657, 114 L.Ed.2d 26 (1991).

sex, all in a class of claims protected by federal law. Or the claims could have involved constitutional issues (e.g. protected speech) or state issues (e.g. contract disputes). Of course, the advantage of the grievance procedure, which could result in binding arbitration, was that a just result could be achieved without literally making every employment dispute a federal case. This procedure would be a much less expensive and probably more efficient method to resolve disputes. As the majority points out, however, the problem is with the CBA's Article 17.2, which precludes or terminates the grievance procedure in the event "an employee seeks resolution of the matter in any other forum." This choice makes sense to the Union and the Board because it adds a less expensive alternative to resolving the dispute that would otherwise end up in a state or federal court. Nevertheless, the EEOC considers this choice to be discriminatory under § 4(d) of the ADEA because it results in the loss of a contractual benefit (the right to grieve) as a result of the employee's decision to file a charge, complaint, or lawsuit because of age. This, in turn, is deemed "discrimination" based on the act of pursuing the ADEA remedy (or for that matter, any other allegedly discriminatory act based on race, color, national origin, religion, or sex).

Article 17.2 does not discriminate because of age; it does not single out ADEA claimants from those filing other types of claims. However, § 4(d) makes the act of pursuing ADEA remedies, not age, the forbidden factor. Since under Article 17.2 an employee is treated less favorably because he filed a claim than he would have been treated otherwise, I agree that Article 17.2 technically violates Section 623(d) of the ADEA, and I concur, albeit

reluctantly, with the result of the majority's opinion. But while the EEOC has advanced a technically correct reading of § 4(d), my concern is that the EEOC's approach will eliminate the contractual grievance procedure as a viable option for a Union member to use as an alternative means to resolve a dispute. Without Article 17.2, the Board has little incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum. As it is, the collective bargaining agreement would offer an incentive for both sides to resolve the issue quickly, before statutes of limitations or other time limits expires. If the grievance procedure wasn't working, the Union member could turn to the courts (or some other form of arbitration), thus overriding the grievance procedure. Now the Union member will be permitted to operate in two forums, and presumably take the best deal. But the Board may see no benefit in doubling its exposure and adding to the costs of its administrative and legal defense. Thus, it could conclude that if court action must be an alternative, it will be the only alternative. It seems to me that this rigid result was not really the goal of our federal laws against discrimination. Nevertheless, any adjustment will have to be statutory, not with the courts.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES and University Professionals of Illinois, Defendants.

No. 86 C 00295.

United States District Court,
N.D. Illinois, E.D.

May 2, 1990.

Sharon Seeley and Jason Hegy, E.E.O.C., and Stephen A. Yokich, Cornfield & Feldman, Chicago, Ill., for plaintiff.

Mark T. Dunn, Dunn Goebel Ulbrich Morel & Hundman, Bloomington, Ill., and Kenneth R. Dolin, Pope Ballard Shepard & Fowle, Chicago, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

The Equal Employment Opportunity Commission ("EEOC") has brought this action against the Board of Governors of State Colleges and Universities ("Board") and the University Professionals of Illinois ("Union"). The EEOC alleges that the defendants' collective bargaining agreement violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d). Currently before the Court is the EEOC's motion for partial summary judgment on the issue of liability and the Board's motion for summary judgment. For the reasons given below, we grant summary judgment in favor of the Board.

Background

Since 1977, the Board, which oversees the operations of five state universities, has recognized the Union as the sole representative of academic employees. The relationship between these parties is governed by a collective bargaining agreement ("CBA"). Among the provisions of this agreement is a grievance procedure through which employees can seek redress of violations of the contract.

However, the CBA also includes a provision which allows the Board to terminate grievance procedures if the employee institutes proceedings involving the same subject matter in another forum. Article 17.2 of the CBA provides:

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative of [sic] judicial, the Board or any university shall have no obligation to entertain or proceed further with this matter pursuant to this grievance procedure.

On April 9, 1984, Raymond Lewis filed a grievance pursuant to the CBA. Lewis was a faculty member at Northeastern Illinois University who was denied tenure. In his grievance, he complained that the President of the University had improperly interpreted and applied the criteria for tenure determinations.

While this grievance was pending, Lewis filed a charge with the EEOC, alleging that he had been denied tenure on the basis of his age. When the Board learned

that Lewis had filed a charge with the EEOC, it invoked Article 17.2 of the CBA and suspended the grievance proceedings. Lewis subsequently updated his EEOC charge to included a charge that the Board had retaliated against him for filing an ADEA charge.

Although Lewis and the Board settled their dispute, the EEOC subsequently filed this action against the Board and the Union. The EEOC charges that, since 1979, the Board has violated § 4(d) of the ADEA by terminating the grievances of those employees who filed charges or complaints under the ADEA. The EEOC seeks to enjoin the Board from engaging in any practice that discriminates against employees who have asserted their rights under the ADEA.

Shortly after the suit was filed, the Board filed a motion to dismiss for failure to state a claim upon which relief could be granted. The Board contended that Article 17.2 was included in the CBA in order to prevent the potential inconsistent results of litigating in two forums and to save time, effort and money. Judge Susan Getzendanner, to whom this case was originally assigned, denied the motion. She held that the EEOC had stated a *prima facie* case of retaliation. In addition, Judge Getzendanner suggested that the Board's arguments relating to the purposes of Article 17.2 constituted an affirmative defense that raised issues not properly addressed on a motion to dismiss. However, she expressed doubt as to whether the justifications presented by the Board were legally sufficient to rebut a *prima facie* case of retaliation. *EEOC v. Bd. of Gov. of State Colleges & Univ.*, 665 F.Supp. 630 (N.D.Ill. 1987) ("BOG I").

After Judge Getzendanner issued this opinion, the EEOC moved for partial summary judgment on the issue of liability. Judge Getzendanner resigned shortly after issuing this opinion, and this case was reassigned to us. We held the Board's good faith justifications for including Article 17.2 in the CBA could constitute a defense to the EEOC's claim of retaliation. *E.E.O.C. v. Bd. of Gov. of State Colleges & Univ.*, 706 F.Supp. 1877, 1384 (N.D.Ill.1989) ("BOG II"). This holding rested on the Seventh Circuit's opinion in *Rose v. Hearst Magazines Division, The Hearst Corp.*, in which the Court stated that, "[i]f [an employer] acted in good faith, it cannot be logically held to have retaliated against [an employee]." 814 F.2d 491, 493 (7th Cir. 1987). We found that the evidence produced by the Board created an issue of fact as to their good faith, and we warned the EEOC that we would grant summary judgment in favor of the Board if it could not rebut this evidence. The parties have responded to this admonition by filing the current motions.

Discussion

The Seventh Circuit has held that an employer acting in good faith cannot logically be held to have retaliated against an employee. *Rose v. Hearst Magazines Div., The Hearst Corp.*, 814 F.2d 491, 493 (7th Cir.1987). Unfortunately, the Court has not explained how the concept of "good faith" should be applied on a case by case basis. Because the Board contends that its good faith precludes a finding of retaliatory discharge, the current motions force us to delve into this rather perplexing territory.

In *Rose*, the plaintiff alleged that the Hearst Corporation retaliated against him for filing charges with the EEOC. Following a trial, the jury was presented with various special verdict questions. The jury found that Rose had proved that the filing of the EEOC charge was a determining cause for his discharge. However, the jury also found that Rose had failed to prove that Hearst had "willfully" violated age discrimination law when it discharged him. *Id.* at 493.

The Seventh Circuit found that these two findings were inconsistent and reversed the judgment. "The jury found that Hearst's violation of the Act was nonwillful. If Hearst acted in good faith, it cannot be logically held to have retaliated against Rose." *Id.* at 493. Stated another way, the Court held that an employer has not unlawfully retaliated against its employee unless it acted willfully.

At first glance, this holding seems to be at odds with some of the Court's other discussions of discriminatory intent in the context of age discrimination. In *Burlew v. Eaton*, the Court distinguished between willful and nonwillful violations of the ADEA. 869 F.2d 1063, 1066 (7th Cir.1989). The Court explained that an age discrimination plaintiff need only show that age was a determining factor in the challenged action. For example, an age discrimination claim could result from an employer's unconscious application of stereotypes. Therefore, a plaintiff can establish liability for age discrimination without presenting any evidence of the defendant's state of mind. *Id.*

The apparent inconsistency between *Rose* and *Burlew* can only be reconciled by distinguishing retaliation claims from ordinary age discrimination claims. While an

employer may unconsciously discriminate against an employee, the same cannot be said for an act of retaliation. Retaliation, by its very nature, requires that the employer undertake its actions willfully. This distinction is implicit in the Seventh Circuit's holding that an employer who acts in good faith cannot logically be held to have retaliated against its employee. *Rose,* 814 F.2d at 493. Therefore, we find that *Rose* stands for the proposition that an employee who claims that her employer retaliated against her for exercising her rights under the ADEA must establish that the employer undertook the challenged actions with the intent to retaliate.

Having reached this conclusion, we must also reject the EEOC's argument that an employer's good faith should be treated as an affirmative defense, with the burden of proof resting on the employer.[1] The ultimate burden of proving that the challenged conduct violates the ADEA remains with the plaintiff. *See, e.g., Burlew,* 869 F.2d at 1063. Because willfulness is a necessary component of retaliation, evidence of the employer's good faith justifications for the challenged conduct should be treated as evidence that rebuts the plaintiff's evidence of discriminatory intent, rather than as an affirmative defense which the employer must separately prove.

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[1] We note that in both BOG I and BOG II, reference was made to the "affirmative defense of good faith." However, in BOG I, Judge Getzendanner did not consider the Seventh Circuit's opinion in *Rose.* In BOG II, we expressly declined to make a determination of whether the Board or the EEOC bore the burden of proof. 706 F.Supp. at 1383.

Applying this framework to the facts at hand, we find that the Board is entitled to summary judgment. The Board has produced facts which establish that it adopted Article 17.2 in order to avoid inconsistent results and to save the time, money and effort resulting from litigating in two forums simultaneously. The EEOC has produced no facts which indicate that these were not the actual reasons behind the adoption of the provision.

Although it has produced no facts that suggest the Board's motives were retaliatory, the EEOC suggests that the absence of certain facts calls the Board's motives into question. First, the EEOC suggests that the Board must have willfully intended to discriminate because Article 17.2 has not been the subject of negotiations between the Board and the Union. However, we find no correlation between the absence of negotiation and the Board's motives. The fact that the Board and the Union did not haggle over the provision during negotiations neither increases nor decreases the probability that the Board's motives were discriminatory.

The EEOC also suggests that we should find that the Board willfully retaliated because it failed to conduct "studies, analyses or inquiries" or prepare "compilations or reports" related to whether Article 17.2 could actually be expected to result in savings of time, money or effort. However, as the Board observes, it is a fairly well established principle that limiting litigation to one forum conserves resources and prevents inconsistent decisions. *See, e.g., Lytle v. Household Manufacturing*, ___ U.S. ___, ___, 110 S.Ct. 1331, 1337, 108 L.Ed.2d 504 (1990). The EEOC is clutching at straws when it argues that the Board's failure

to research these principles suggests that it intended to retaliate against its employees.[2]

When confronted with a motion for summary judgment, a party who bears the burden for proof on a particular issue "must affirmatively demonstrate, by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Petru v. City of Berwyn*, 872 F.2d 1359, 1362 (7th Cir.1989) (emphasis in original) (quotations omitted). Because the EEOC has failed to establish a genuine issue of fact as to the Board's motives, we grant summary judgment in favor of the Board. It is so ordered.

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[2] Indeed, given the Board's stated desire to save money, one might question its motives had it undertaken a costly study to affirm a relatively common sense principle.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES and University Professionals of Illinois, Defendants.

No. 86 C 0295.

United States District Court,
N.D. Illinois, E.D.

Feb. 14, 1989.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

The plaintiff Equal Employment Opportunity Commission ("EEOC") brought this action against the Board of Governors of State Colleges and Universities ("the Board") and University Professionals of Illinois ("the Union") under section 4(d) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d) (1982). The suit seeks to enjoin the defendants from discriminating against those Board employees who file charges or complaints under the ADEA. Currently before the Court is the EEOC's motion for partial summary judgment on the issue of liability. For the reasons set forth below, that motion is denied.

Background

The Board, which operates five public universities in the State of Illinois, *see* Ill.Rev.Stat. ch. 144, paras. 1001-1017 (1987), and the Union, which represents academic employees at those universities, are parties to a

collective bargaining agreement ("CBA").[1] Article 17.2 of the CBA, the article at issue in this case, provides in pertinent part as follows:

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

Article 17.2 came into play in this case when the President of Northeastern Illinois University ("NIU") recommended that Raymond Lewis, an Associate Professor of Business Law, not be granted tenure. Plaintiff's Local Rule 12(e) Statement, Exhibit C ("Pltf's Exh. C"). On April 9, 1984, Lewis filed a grievance contending that the President had improperly interpreted and applied the evaluation criteria in making his decision and had been influenced by factors outside the evaluation criteria. Pltf's Exh. D. Lewis did not, however, specifically mention age discrimination. On May 3, 1984, the Board adopted the President's recommendation and denied Lewis tenure. It is not clear what, if anything, happened with regard to the grievance in the next year, but an arbitration hearing was scheduled for May 1985. Shortly before the hearing took place, on May 14, 1985, Lewis filed a charge with the EEOC, alleging that he had been denied tenure because of his age. Pltf's Exh. B. The Board

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[1] The Board and the Union have entered a series of CBAs, but each CBA is apparently the same with regard to the provision at issue in this case. Accordingly, we will treat them as a single CBA.

did not learn of the charge until after the arbitration hearing, but when it did become aware of the charges, it indicated that it wished to invoke Article 17.2 and asked that the arbitrator not make his decision. Pltf's Exhs. E, F. After Lewis learned of this, he filed a second charge with the EEOC, dated June 13, 1985, alleging that the Board had retaliated against him for the filing of the ADEA charge. Pltf's Exh. G. The Board now claims that it later changed its mind and informed the arbitrator that it had decided not to invoke Article 17.2. Affidavit of William H. Lieneman, Defendant's Local Rule 12(f) Statement, Exhibit 1 ("Def's Exh. 1"), ¶ 21. In addition, the Board claims that it subsequently reached a settlement with Lewis. *See* Affidavit of Thomas D. Layzell, Def's Exh. 2, ¶ 5.

On July 30, 1985, the EEOC issued a charge on behalf of Lewis and others similarly situated against NIU and the Board. On August 7, 1985, representatives from the EEOC and the Board met in order to discuss the charge. Each side now accuses the other of intransigence at this meeting and thereafter, and, as we discuss below, the Board argues that the EEOC did not truly attempt to conciliate, as required by section 7(b) of the ADEA, 29 U.S.C. § 626(b) (1982). At any rate, the EEOC subsequently informed the Board that it believed conciliation was unsuccessful, and on January 14, 1986, filed the present suit against the Board and the Union. The suit charges that at least since January 1, 1979, the Board has violated section 4(d) of the ADEA, 29 U.S.C. § 623(d) by terminating the grievances of those employees who filed charges or complaints under the ADEA. The effect of this practice, according to the EEOC, has been to deprive

employees of a term or condition of employment, deterring them from exercising their rights under the ADEA. The EEOC, therefore, asks us to enjoin the Board from engaging in any practice that discriminates against employees who have asserted their ADEA rights, to order the Board to carry out programs that eradicate the effects of past and present unlawful practices, and to direct the Board to "make whole" those employees adversely affected by these practices.

After the suit was filed, the Board moved to dismiss for failure to state a claim upon which relief could be granted.[2] Judge Susan Getzendanner, to whom this case was then assigned, held that the complaint stated a claim and denied the motion to dismiss on April 22, 1987. *Equal Employment Opportunity Commission v. Board of Governors of State Colleges and Universities*, 665 F.Supp. 630 (N.D.Ill. 1987). We will discuss Judge Getzendanner's opinion in greater detail below, but a summary is appropriate here. At the outset, Judge Getzendanner, who has since left the

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[2] The Board also asserted that the suit should be dismissed because the Court lacked subject matter jurisdiction, but never developed this position. 28 U.S.C. § 1345. Clearly, we have jurisdiction under 28 U.S.C. § 1345 (1982) to entertain any suit brought by a federal agency expressly authorized to sue by Act of Congress, and the EEOC has been expressly authorized to sue by section 7 of the ADEA, 29 U.S.C. § 626 (1982).

In addition, it might be noted that Article 17.2 does not appear in the complaint. Nonetheless, the parties argued its effect in their briefs, and Judge Getzendanner discussed it in her opinion. Technically, Judge Getzendanner perhaps should have converted the motion to a motion for summary judgment under Rule 56, but since all parties were aware that Article 17.2 would be considered, there seems to have been no harm done.

bench, discussed several conflicting principles of law. First was the doctrine that a party is not required to submit any dispute to arbitration that it has not agreed to submit. In this case, however, the doctrine, derived from contract law and applied to labor law by the 1960 *Steelworkers Trilogy*,[3] conflicts with section 4(d) of the ADEA, 29 U.S.C. § 623(d), which prohibits discrimination against employees who bring charges under the ADEA. Also, the non-arbitration doctrine conflicts with the rule that any collective bargaining agreement must comply with federal law, especially those concerning discrimination, and that a union therefore cannot waive the rights of its members under an anti-discrimination statute such as the ADEA. *See* 665 F.Supp. at 633 (citing *UMWA Health & Retirement Fund v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *U.S. Equal Employment Opportunity Commission v. County of Calumet*, 686 F.2d 1249 (7th Cir.1982)). Judge Getzendanner concluded that this conflict must be resolved in favor of the employee's right to be free from discrimination. In addition, Judge Getzendanner concluded that Article 17.2 of the CBA constituted a waiver of employees' rights under the ADEA, because it "permits the employer to discriminate against employees who bring ADEA actions." 665

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[3] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

F.Supp. at 635. Finally, Judge Getzendanner rejected the Board's contention that Article 17.2 should be considered valid since it was motivated by a desire to avoid unnecessary duplication of effort. Judge Getzendanner considered the Board's contention as an affirmative defense and declined to resolve it on a motion to dismiss, since no record had yet been developed. Moreover, without deciding the issue, Judge Getzendanner cast doubt on the Board's implicit argument that a desire to avoid duplication of effort was legally sufficient to rebut a prima facie case of discrimination, an argument we discuss in great detail below.

After Judge Getzendanner denied the motion to dismiss,[4] the EEOC brought the present motion for partial summary judgment.[5]

Summary Judgment

Under the Federal Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine

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[4] When Judge Getzendanner left the bench, the case was reassigned to our calendar, and the parties completed briefing the motion in December 1987. We then referred the case to Magistrate Bernard Weisberg, in the hope that a settlement could be reached, but Magistrate Weisberg's efforts proved unsuccessful, and the case was returned to us.

[5] We note that the Union answered the EEOC's complaint but has not otherwise participated in the suit. It has asked, however, that if we invalidate Article 17.2, we do so with regard to all employment discrimination statutes and not just the ADEA. Since we conclude in this opinion that there is insufficient reason to invalidate Article 17.2 under the ADEA, we need not consider this request.

issue as to any material facts and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). This standard places the initial burden on the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Rule 56(c)). Once the moving party has done this, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

The Eleventh Amendment

The Board asserts that the eleventh amendment bars any ADEA claims against it,[6] but we disagree. In general, the eleventh amendment immunizes the states and their agencies against any suits in federal court, *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985); *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974), but Congress can abrogate the states' eleventh amendment immunity if it acts pursuant to section five of the fourteenth amendment, *Atascadero State Hospital v. Scanlon*,

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[6] The Board labels its eleventh amendment argument as an affirmative defense, just as it does with the conciliation argument that we discuss in the next section. However, our agreement with the Board on either of these issues would preclude the consideration of any other issues in this case; accordingly, we will deal with the eleventh amendment and the conciliation arguments up front.

473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). The Seventh Circuit has concluded that the ADEA was passed pursuant to section five of the fourteenth amendment, *Equal Employment Opportunity Commission v. Elrod*, 674 F.2d 601, 603 (7th Cir.1982); under the Seventh Circuit's analysis, therefore, ADEA actions may be brought against state agencies such as the Board. The Board, however, argues that *Elrod* was wrongly decided. The Board notes that, although the Supreme Court has not definitively decided the issue, four members of the Court have argued that the ADEA was not – indeed, could not have been – passed pursuant to the fourteenth amendment. *See Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 259-63, 103 S.Ct. 1054, 1072-75, 75 L.Ed.2d 18 (1983) (Burger, C.J., joined by Powell, Rehnquist and O'Connor, JJ., dissenting). Perhaps, when squarely faced with the issue, the Supreme Court will hold that Congress was not acting under the fourteenth amendment when it passed the ADEA. But until that happens, or until the Seventh Circuit changes its mind, we are bound to follow the Seventh Circuit's resolution of the issue in *Elrod*. We accordingly conclude that the eleventh amendment does not bar this suit.

Conciliation

The Board also argues that there is a genuine issue of material fact concerning the EEOC's attempt to conciliate the issue. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides that "[b]efore instituting any action under this

section, the [EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the ADEA] through internal methods of conciliation, conference, and persuasion." As suggested above, the parties disagree about the EEOC's attempt to conciliate the claim, and the Board has presented evidence that may create a factual issue concerning the EEOC's good faith in the conciliation process. Yet even if a factual issue has been raised, we conclude that dismissal is unnecessary here. Section 7(b) of the ADEA vests a court with broad discretion "to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the ADEA. 29 U.S.C. § 626(b). Relying on this language, a number of courts have held that when the EEOC has failed to conciliate on ADEA claim before bringing suit, the proceedings may be stayed so that conciliation may be attempted. *Marshall v. Sun Oil Co. (Delaware)*, 605 F.2d 1331, 1338 n. 8 (5th Cir. 1979); *Marshall v. Sun Oil Co. of Pennsylvania*, 592 F.2d 563, 566 (10th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974); 3 A A. Larson & L. Larson, *Employment Discrimination* § 102.24(b) at 21-244 (1988). As a general matter, this rule is sound. But because we referred this matter to Magistrate Weisberg to attempt settlement and because his attempts were unsuccessful, despite five settlement conferences over the course of eight months, the application of the general rule would be inappropriate here. Therefore, even if the EEOC failed to conciliate the claim – a question we do not decide – staying the litigation at this late date would

appear to be fruitless and would not "effectuate the purposes" of the ADEA.[7]

Adverse Employment Action

That brings us to the substance of the EEOC's complaint. Section 4(d) of the ADEA provides in pertinent part as follows:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA].

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[7] Our resolution should in no way be read to denigrate the importance of conciliation. Wherever possible, enforcement should be effected without resort to formal litigation. *See Sun Oil Co. of Pennsylvania*, 592 F.2d at 565. As the Eighth Circuit has stated:

> Although the availability of and resort to courts allow for a method of resolving conflicts, the framework of a free people and the functioning of their government depends not essentially upon the courts, but upon the desire of the people to agree within the framework of their law and to compromise the differences outside the walls of a courtroom. The voluntary compliance provisions recognize this principle and also wisely perceive that conciliation is a difficult process in which exhaustive, affirmative action, in this situation initiated by the Secretary, is demanded to achieve resolution without the necessity of legal action.

Ace Hardware Corp., 495 F.2d at 375.

29 U.S.C. § 623(d). The EEOC claims that Article 17.2 runs afoul of this provision, since employees like Raymond Lewis who file charges with the EEOC lose their right to have an in-house arbitration of grievances. In response, the Board asserts that Article 17.2 does not violate the ADEA, because it was adopted in a good faith effort to avoid duplication of effort. In addition, the Board claims that the EEOC failed to meet its burden concerning Professor Lewis, since his grievances were arbitrated, albeit after a short delay. We will return to the Board's good faith argument shortly, but we must first determine whether there was any adverse employment action taken here at all.

The Board admits – by its silence, *see* Local Rule 12(m) – that on May 30, 1985, it asked the arbitrator to postpone further consideration of Lewis' grievance until it had decided wither to invoke Article 17.2. *See* Pltf's Exh. F. The Board also admits that it did decide to invoke Article 17.2 and informed the arbitrator of that decision on June 13, 1985. *See* Pltf's Exh. E. However, the Board now presents evidence that on June 28, 1985, it told the arbitrator that it had changed its mind, and that the arbitration should proceed. Affidavit of William H. Lieneman, Def's Exh. 1, ¶ 21. According to the Board's Chancellor, Lewis and the Board subsequently reached a settlement on Lewis' claims. Affidavit of Thomas D. Layzell, Def's Exh. 2, ¶ 5.

Based on the evidence that it has presented, the Board argues, and we agree, that a genuine issue of fact exists as to whether the Board took any adverse action. The evidence presented by the Board, if believed, would tend to show that Lewis' entitlement to arbitration was

not lost, but only delayed. Moreover, the delay was for less than a month, from May 30 to June 28; in light of the unexplained thirteen-month delay between the filing of Lewis' grievance and the arbitration hearing, this one-month delay seems insignificant. The EEOC presents no evidence of other employees whose grievances were terminated for filing an ADEA claim, or who were deterred from filing such a claim. In the absence of such evidence, summary judgment is inappropriate, at least with regard to past violations of the ADEA.

That does not end our inquiry, however, because the EEOC is not merely seeking to remedy past violations of the ADEA; it is also attempting to prevent violations in the future. The EEOC claims that Article 17.2 would violate the ADEA if it were applied, and therefore asks us to enjoin the Board from applying it. Certainly, the loss of in-house arbitration of grievances would constitute an adverse employment action. Accordingly, we must go on to consider whether Article 17.2 violates the ADEA.

Direct or Indirect Evidence

The parties disagree over how such a violation of the ADEA should be proved in this case. In general, there are two ways of proving employment discrimination, by direct or circumstantial evidence on the one hand or by indirect[8] evidence on the other. *See Oxman v. WLS-TV*, 846

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[8] We follow the Seventh Circuit's lead in drawing a distinction between circumstantial and indirect evidence, *see, e.g., Oxman*, 846 F.2d at 452, but we note that the distinction is not

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F.2d 448, 452 (7th Cir.1988). Where a plaintiff attempts to prove a case by indirect evidence, he or she may utilize the burden-shifting method of proof first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See also Oxman*, 846 F.2d at 452 (*McDonnell Douglas* burden-shifting applied to ADEA cases); *Collins v. State of Illinois*, 830 F.2d 692, 702 (7th Cir.1987) (*McDonnell Douglas* burden-shifting applied to retaliation claims). In a retaliation case, the burden-shifting works as follows:

> Plaintiff has the burden of establishing a prima facie case of retaliation. The burden then shifts to defendants to articulate a legitimate non-discriminatory reason for the challenged action. If defendants make that articulation, the burden shifts back to plaintiff to prove that the defendants' proffered reason is a pretext for an underlying retaliatory reason.

Collins, 830 F.2d at 702.

By contrast, when the plaintiff presents direct evidence of discrimination, the *McDonnell Douglas* burden-shifting method need not be applied. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613,

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clear and only muddies an already confusing area of the law. Presumably, indirect evidence is that evidence which calls for the application of the burden-shifting method of proof described in the text. Such evidence, however, would appear to be merely another form of circumstantial evidence. It is not readily apparent where the line should be drawn between indirect evidence, which requires the shifting of evidentiary burdens, and other circumstantial evidence, which does not.

621-22, 83 L.Ed.2d 523 (1985). In such a case, the employer must either rebut that direct evidence or present an affirmative defense. *See id.* at 122, 105 S.Ct. at 622. Of course, if the defendant presents an affirmative defense, the court must evaluate both its legal and factual sufficiency.

The parties have spilled a lot of ink over which method we should apply here. The EEOC argues that Article 17.2 constitutes direct evidence of retaliation, so that the shifting of burdens is not necessary. The Board responds that Article 17.2 is not direct evidence of retaliation, since it was adopted in good faith, and that the *McDonnell Douglas* method of proof must therefore be applied.

We conclude, however, that the parties have wasted their efforts on this issue, for the method of proof does not make a difference in this case. If we consider Article 17.2 as direct evidence of retaliation, we would than have to consider the factual and legal sufficiency of the Board's principal affirmative defense, its good faith in instituting the provision. If, on the other hand, we apply the *McDonnell Douglas* burden-shifting method, the analysis would be more elaborate, but the result would be the same. We would first determine whether the EEOC has made a prima facie case of retaliation. To establish a prima facie case, the EEOC must show that (1) an employee engages in statutorily protected activity, such as the filing of a charge with the EEOC; (2) the employer takes an adverse action against the employee; and (3) there is a causal link between the protected expression and the adverse action. *Collins*, 830 F.2d at 702; *Jennings v. Tinley Park Community Consolidated School District No. 146*, 796 F.2d 962, 966-67

(7th Cir.1986); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 280 (7th Cir. 1985). Clearly, Article 17.2 meets all three elements: (1) when an employee files an EEOC charge, (2) the Board takes an adverse action by refusing to proceed with in-house arbitration (3) because of Article 17.2. We conclude, as Judge Getzendanner concluded, *see* 665 F.Supp. at 635, that the EEOC has established a prima facie case, and that the burden is therefore shifted to the Board to articulate a legitimate nondiscriminatory reason for Article 17.2. Again, the Board relies on its purported good faith. We must determine whether that is legally sufficient to shift the burden back to the EEOC to present evidence that the Board's good faith is a pretext. In short, no matter which method of proof we employ, we must determine whether the Board's good faith is legally sufficient; if it is, we must then determine whether the evidence the Board presents to substantiate its good faith is factually sufficient or is merely a pretext.[9]

The Board's Good Faith

The Seventh Circuit has stated that "[i]f [an employer] acted in good faith, it cannot be logically held to have retaliated against [an employee]." *Rose v. Hearst Magazines Division, The Hearst Corp.*, 814 F.2d 491, 493 (7th Cir.1987). The Board claims that this passage clearly indicates that good faith is a sufficient affirmative defense to

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[9] If we had to make a choice, we would consider this a direct evidence case, since Article 17.2, like the policy challenged in *Thurston*, is "discriminatory on its face." *See Thurston*, 469 U.S. at 121, 105 S.Ct. at 622. But, as suggested in the text, we do not need to make a choice.

a charge of retaliation. We agree, but we do so with some reluctance.

Our reluctance springs from three sources. First, we note that the Seventh Circuit's statement comes from a case with a questionable holding. In *Rose*, the employee alleged, *inter alia*, that he was suspended and discharged in retaliation for filing age discrimination charges with the EEOC and with the Illinois Fair Employment Practices Division. The case was submitted to a jury with special verdict questions, two of which read as follows:

> 1. Do you find that plaintiff proved by a preponderance of the evidence that the filing of age discrimination charges was a determining cause for his discharge?
>
> * * *
>
> 2. Do you find that plaintiff proved by a preponderance of the evidence that defendant "willfully" violated the age discrimination law when it discharged plaintiff?

In response to question number 1, "The jury answered 'yes,' finding that Rose [the employee] was terminated in retaliation for filing the age discrimination charges. In response to [question number 3], however, the jury answered 'no,' finding that the retaliation was not willful." Rose, 814 F.2d at 493. The seventh Circuit concluded that the two special verdicts were "hopelessly irreconcilable." "The jury found that Hearst's [the employer's] violation of the Act was nonwillful. If Hearst acted in good faith, it cannot be logically held to have retaliated against Rose." *Id.* The court therefore remanded the retaliation claim to be tried again.

The court's conclusion poses some difficulties. True, retaliation has to be deliberate or willful, in the usual way that term is used. But "willful" has a special meaning in the ADEA relating to liquidated damages and the statute of limitations. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides that "liquidated damages shall be payable only in cases of willful violations of [the ADEA]." In addition, section 7(e)(1), 29 U.S.C. § 626(e)(1), incorporates the statute of limitations found in the Fair Labor Standards Act ("the FLSA"), 29 U.S.C. § 255 (1982). The FLSA, in turn, provides a two-year statute of limitations, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." The courts have interpreted "willful," as used in these provisions, to refer to what level of knowledge the employer has about the ADEA and whether its conduct violates the statute. Just this past term, the Supreme Court has clarified the standard for willfulness; an employer has committed a willful violation if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, ___ U.S. ___, 108 S.Ct. 1677, 1681, 100 L.Ed.2d 115 (1988). The standard in the Seventh Circuit at the time of the *Rose* decision was slightly different, *see Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1327 (7th Cir.1987) ("knew or reasonably should have known that its violations were in violation of the law"), *vacated*, ___ U.S. ___, 108 S.Ct. 1990, 100 L.Ed.2d 223 (1988), but under either standard, it seems that an employer can violate the ADEA without "willfully" violating the statute. Thus, under the facts of the *Rose* case, it seems possible that the employer fired the employee for

bringing a charge before the EEOC, yet not known that such retaliation was illegal under the ADEA; the employer would have violated the ADEA, but not "willfully." Accordingly, it appears that the two jury verdicts in *Rose* – that the employer fired the employee in retaliation, but that the employer did not willfully violate the ADEA – were not "hopelessly irreconcilable."[10]

Our second problem involves the nature of a violation under section 4(d) of the ADEA. Section 4(d) cases are generally labeled retaliation or retaliatory discharge cases, which implies that the employer must act with some type of malice or animus toward the employee. Yet section 4(d) says nothing about retaliatory animus. Rather, it merely states that "[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge." To be sure, in all of the section 4(d) cases we have seen, the employee's theory was that the employer was motivated by retaliatory animus, and this was certainly true in *Rose*. But on its face, at least, section 4(d) does not seem to require such animus.

---

[10] Judge Manion has noted the anomalous holding in *Rose*. *See Coston*, 831 F.2d at 1338 n. 1 (Manion, J., concurring). We recognize that the Seventh Circuit's conclusion – that a finding of good faith precludes a finding of retaliation under the ADEA – may still be correct, even if its premise – that retaliation under the ADEA is necessarily "willful" – is mistaken. But the mistaken premise at least casts some doubt on the validity of the conclusion.

Our last difficulty with applying the Seventh Circuit's statement to the present case is Judge Getzendanner's previous opinion. Judge Getzendanner strongly hinted that she believed Article 17.2 violated the ADEA:

> Not only is the factual sufficiency of the duplication justification in dispute, but its legal sufficiency is also in doubt. First, this type of justification does not actually rebut the EEOC's claim that the Board has discriminated against those employees who exercise their EEOC rights. Rather, it is an assertion that this sort of non-malicious discrimination ought to be acceptable. It is unclear whether § 4(d) regards this sort of discrimination as acceptable, even if it saves the employer and the union scarce resources. Presumably, the legislative judgment behind § 4(d) is that any discrimination against an employee who exercises his ADEA rights may so deter the exercise of those important rights that it is worth prohibiting that sort of discrimination. *Cf. Pettway v. American Cast Iron Pipe Company,* 411 F.2d 998 (5th Cir.1969) (describing purpose behind retaliation provision of Title VII). Second, the Supreme Court in *Alexander [v. Gardner-Denver Co.,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)] seemed to expressly contemplate that duplication of decisional efforts would be an acceptable consequence of its holding in that case. The Court observed that "legislative enactments in this area [of civil rights] have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander,* 415 U.S. at 47, 94 S.Ct. at 1019. This led the Court to conclude:
>
> > We think, therefore, that the federal policy favoring arbitration of labor disputes and

> the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.
>
> *Id.* at 59-60, 94 S.Ct. at 1025. Thus, this court has its doubts as to whether the Board's desire to avoid duplicative efforts, even if factually supportable, is a valid justification for treating employees differently simply on account of their decision to exercise their employment discrimination rights.

665 F.Supp. at 635-36. This paragraph is not a holding of the case, since it was couched only in terms of Judge Getzendanner's "doubts" about the Board's defense. But is is rather strong dicta and seems intended as a broad hint to the EEOC to move for summary judgment. In short, it is almost, if not quite, the law of the case, and in the absence of the Seventh Circuit's contrary language in *Rose*, we would be reluctant to reverse course and disagree with Judge Getzendanner's conclusion.

However, we cannot ignore *Rose*[11] and its statement that "[i]f [an employer] acted in good faith, it cannot be logically held to have retaliated against [an employee]." Even though we have our doubts about that decision, we are compelled to follow it. Therefore, in light of *Rose*, we

---

[11] Judge Getzendanner issued her opinion less than one month after the *Rose* decision came down, and she appears to have been unaware of the Seventh Circuit's opinion.

conclude that good faith is a defense to actions brought under section 4(d) of the ADEA.

Factual Sufficiency

We also conclude that the Board has presented sufficient evidence to raise a genuine issue concerning its good faith. Thomas Layzell, the Chancellor of the Board, states as follows in his affidavit:

> There were two principal reasons why the Board and Union have agreed to such a provision in all their agreements. First, the provision allows both the Board and the Union to conserve their limited resources. The Board has its budget appropriated annually by the State. Because the Board agreed voluntarily to a grievance procedure and because such a procedure is costly the Board did not want to be in the position of duplicating time, effort and money by participating in two proceedings involving a matter. Second, the Board recognized that a possibility existed that inconsistent results might be reached if a matter was processed both in a grievance/arbitration hearing and in another forum. Neither the Board nor the Union have [sic] ever intended or thought that such a provision night [sic] be considered "retaliation" against any person for filing any kind of charge with any agency.

Affidavit of Thomas D. Layzell, Def's Exh. 2, ¶ 4. Chancellor Layzell's statement is sufficient to present a genuine issue concerning the Board's good faith, and since the

EEOC presents no evidence to the contrary, summary jugment [sic] must be denied.[12]

Further Proceedings

In any further proceedings in this case, the EEOC will need to present contrary evidence if it hopes to rebut the Board's affirmative defense (or, of one prefers the *McDonnell Douglas* language, if it hopes to show that the Board's desire to avoid duplication of effort is a mere pretext). It is not clear of the EEOC can do this; we tend to think that it cannot.[13] Accordingly, and in light of our "widely acknowledged . . . power to enter summary judgment *sua sponte*, so long as the losing party [is] on notice that she [has] to come forward with all of her evidence," *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986), the EEOC is given twenty days to come forward with evidence tending to rebut the Board's affirmative defense or to show why discovery would be useful on the issue. If the EEOC fails to do so, summary judgment will be entered in favor of the Board and the Union. Perhaps at that time, the seventh Circuit will get a chance to reconsider its decision in *Rose*.

---

[12] Given our resolution of the EEOC's motion, we need not consider any of the Board's other affirmative defenses.

[13] In fact, in its memorandum in support at 8, the EEOC seems to concede that the Board acted in good faith, but the concession may only have been for the purposes of this motion.

Conclusion

For the reasons set forth above, the EEOC's motion for partial summary judgment is denied. The EEOC is given twenty days to come forward with the evidence tending to rebut the board's affirmative defense of a good faith desire to avoid duplication of effort, or to show why discovery would be useful on the issue. If the EEOC fails to do so, we will enter summary judgment in favor of the Board and the Union on the entire complaint. It is so ordered.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, et al., Defendants.

No. 86 C 295.

United States District Court,
N.D. Illinois, E.D.

April 22, 1987.

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MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

Plaintiff Equal Employment Opportunity Commission brings this action against defendants Board of Governors of State Colleges and Universities (the "Board"), and University Professionals of Illinois (the "Union"), under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. (the "ADEA"). The action seeks to enjoin defendants from discriminating against those employees and members of the defendants who have filed charges or complaints under the ADEA. The Board has moved to dismiss the action under Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Because the court finds

that plaintiff has stated a claim upon which relief can be granted, the motion is denied for the reasons set forth below.

Factual Background

The Board (an agency of the State of Illinois) and the Union have entered into a collective bargaining agreement (the "CBA") which contains a provision that allows the Board to terminate an employee's grievance brought under the CBA once that employee files a charge of discrimination with the EEOC which "seeks a resolution of the matter" that is the subject of the grievance. Article 17.2 of the CBA provides:

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any university shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

On April 9, 1984, Raymond Lewis filed a grievance with the Union on account of the decision of the Northeastern Illinois University President not to recommend Lewis to the Board for tenure. The grievance charged that the Board failed to adhere to the University's procedure for granting tenure. On May 14, 1985, Lewis filed a charge of age discrimination with the EEOC. In contrast to the grievance, this charge alleged that Lewis had been denied tenure on account of his age. Besides this difference between the legal theories of these two claims, there may be other differences between the two claim procedures, such as methods of proof and possibilities for

relief, but no record has yet been developed on these points.

After the Board became aware of Lewis' ADEA charge with the EEOC, it invoked Article 17.2 and terminated Lewis' grievance, reasoning that both claims arose out of the same "matter". This termination meant that Lewis was no longer entitled to arbitration of his tenure procedure dispute as prescribed in the CBA. Consequently, the EEOC then brought this action charging that at least since January 1, 1979, the Board has engaged in unlawful and discriminatory employment practices in violation of Section 4(d) of the ADEA, 29 U.S.C. § 623(d). Specifically, the EEOC charged the Board with discriminating against employees who have filed charges or complaints under the ADEA by terminating their grievances brought under the CBA. The EEOC has also alleged that the effect of this practice has been to deprive employees of a term or condition of employment, thus deterring them from exercising their rights under the ADEA.

Legal Discussion

This case presents a conflict between several important and well established principles of law. The court notes them all at the outset. First is the doctrine, derived from contract law, that a party is not required to submit any dispute to arbitration that it has not agreed to submit; or, to put the principle in terms that better apply to this case, a party is not required to submit to arbitration those disputes it agreed it would not have to so submit. This principle has received Supreme Court sanction ever since the 1960 Supreme Court decisions known as the

Steelworkers Trilogy. The Supreme Court has reiterated these principles as recently as its last term. In *AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) the Court stated:

> The principles necessary to decide this case are not new. They were set out by this Court over 25 years ago in a series of cases known as the Steelworkers Trilogy. . . .
>
> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any matter which he has not agreed to so submit." *Warrior & Gulf*, supra [363 U.S. 564] at 582 [80 S.Ct. 1347, 1353, 4 L.Ed.2d 1424 (1960)]. . . . This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. (citations omitted).

Counterpoised against this doctrine are several other familiar precepts of federal law. First, section 4(d) of the ADEA, 29 U.S.C. § 623(d), provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge . . . under this chapter." Furthermore, an "employer and the union cannot agree to terms in a labor contract which violate" federal laws. *U.S.E.E.O.C. v. County of Calumet*, 686 F.2d 1249, 1255 (7th Cir.1982). "The terms of any collective bargaining agreement must comply with federal laws that prohibit discrimination on grounds of race, color, religion, sex or national origin; that protect veterans; that regulate certain industries; and that preserve our competitive economy." *UMWA Health*

and Retirement Fund v. Robinson, 455 U.S. 562, 575, 102 S.Ct. 1226, 1234, 71 L.Ed.2d 419 (1982) (citations omitted). As a result of this limitation on the permissible terms of a collective bargaining agreement, it is now settled that a union, as a party to such an agreement, may not prospectively waive the rights of the employees under such statutes as Title VII, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), or under the ADEA, see *County of Calumet*, 686 F.2d at 1256 ("the decision in *Alexander* extends to the ADEA").

Finally, in the Seventh Circuit, in order to prove a prima facie case of discrimination under § 4(d) of the ADEA, a plaintiff need only establish that "(1) there was statutorily protected activity by the employee; (2) adverse employment action occurred, and (3) there was a causal link between the protected activity and the adverse employment action." *Jennings v. Tinley Park Community*, 796 F.2d 962, 966-67 (7th Cir.1986); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 280 (7th Cir.1985).

The EEOC argues that the conduct alleged in this case violates § 4(d) because Lewis participated in protected activity (filing an ADEA charge), adverse employment action followed (his grievance was terminated), and the adverse action was the direct consequence of the filing of his ADEA claim (i.e., Article 17.2). Furthermore, although the Union and the Board agreed that the Board would not have to submit a case to arbitration when the same "matter" was to be heard before another forum, that agreement is invalid, the EEOC urges, because it amounts to waiver of the individual employee's ADEA right to be free from retaliation for exercising ADEA rights, and such waivers are invalid.

The Board contends that its right not to submit a dispute to arbitration when it has not previously agreed to do so (such as those matters covered by Article 17.2) is fundamental. Second, the agreement embodied in Article 17.2 is valid because it does not constitute a waiver by any union member of any ADEA rights. Finally, the termination agreement served the salutory purpose of avoiding the waste of duplicative proceedings on the same "matter".

Initially, the court evaluates the Board's first contention that its right to be free from submitting to arbitration those matters it has not agreed to submit is essentially inviolate. The court does not write on a clean slate on this issue. As the Steelworkers Trilogy holds, arbitration rights are a matter of contract. Thus, the Board's "right" to be free from submitting those matters to arbitration which it has not agreed to so submit is a right based on fundamental principles of contract law: When an employer has not agreed to arbitrate a dispute, contract law provides that the employer may not be forced to arbitrate. But the employee, of course, also has the right to be free from unlawful discrimination. This case thus presents a conflict between an employer's contractual freedoms and an individual employee's right to be free from unlawful discrimination. In a related context, the Seventh Circuit has held that when there is a conflict between an individual employee's rights under the ADEA and a union's collective bargaining rights, the individual rights must be deemed "superior". *County of Calumet*, 686 F.2d at 1256. See also *Alexander*, 415 U.S. at 51-52, 94 S.Ct. at 1021. Despite the adverse effect on a

union of placing certain individual rights above the interests of the collective union majority, "the principle of majority rule, however central to the national labor relations policy, is on occasion subordinate to the rights of the individual employee. This is true of age discrimination in the workplace. . . . " *County of Calumet*, 686 F.2d at 1256.

Of course, this case does not present a conflict between the rights of the individual and the rights of the collective union. It is potentially a conflict between the rights of the individual and the rights of the employer – specifically, the employer's contractual right not to have to submit to arbitration those issues it did not agree to so submit. Nevertheless, the individual rights of the employee to be free from discrimination, acknowledged in *Alexander* and *County of Calumet* to be superior to the union's rights, are also superior to the contractual rights of the employer. This is because both of those cases also deemed the contractual rights of the employer to be subordinate to the employee's federal employment rights. For example, in *Alexander* the employer was seeking to hold the employee to the terms of the collective bargaining agreement which purportedly disabled the employee from filing a Title VII action after the employee had previously submitted his claim to "final" arbitration pursuant to the agreement. In rejecting the employer's contention that the union's prospective waiver of the employee's Title VII rights in the collective bargaining agreement was valid, the Court was essentially deciding that an individual's Title VII rights were superior to an employer's right to rely on and enforce the terms of its

collective bargaining agreements. See also *County of Calumet*, 686 F.2d at 1255-57. The words of the Supreme Court in *Alexander* make this result clear:

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

415 U.S. at 51-52, 94 S.Ct. at 1021.

Thus, the teaching of *Alexander* and *County of Calumet* is that the union's right to bargain collectively and effectively, *and* the employer's contractual right to rely on the terms of its collective bargaining agreement, are subservient to an employee's employment discrimination rights under Title VII and the ADEA. The implication for this case, therefore, is that an employer's important contractual right to be free from arbitrating those matters it agreed it would not have to arbitrate (such as those in Article 17.2) is also subservient to an employee's rights under Title VII and the ADEA. The priority of the individual employment rights over the employer's contractual rights is of such importance that the individual retains those rights even if the employer has obtained a waiver of those rights in the collective bargaining agreement. Thus, the pertinent question in this case is whether the grievance termination provision of Article 17.2 constitutes a waiver of any rights of the employees secured by the ADEA. If it does, then the waiver is invalid because:

(1) a union cannot prospectively waive a member's individual ADEA rights, and (2) an employer's contractual right to rely on the terms of a collective bargaining agreement is subservient to the employee's non-prospectively-waivable ADEA rights. If Article 17.2 does not constitute a waiver of any ADEA rights, then it may be legally enforceable.

The Board vigorously argues that Article 17.2 does not amount to a waiver of any ADEA rights. For example, the Board correctly points out that nothing anywhere in the CBA states that employees have waived their rights to bring ADEA lawsuits. Thus, in one respect this case is factually dissimilar from *Alexander*. In that case, the employees had agreed in the collective bargaining agreement not to bring Title VII actions once they had submitted employment disputes to "final" arbitration. The Board contends that since the employees here did *not* agree to restrict their right to bring ADEA actions, but only agreed to the termination of a contractually-provided grievance procedure, there has been no waiver of statutory ADEA rights.

This argument is wrong. There has indeed been a waiver of ADEA rights. The collective bargaining agreement states that the Board may terminate the grievance of an employee because he brings an ADEA action. This means that the Union has agreed that the Board may "discriminate" against an employee who enforces his ADEA rights. It is undisputed that § 4(d) of the ADEA prohibits an employer from engaging in discrimination against a person who brings an ADEA action. It is also clear that *Robinson* teaches that an employee may not validly agree, through a collective bargaining agreement,

that his employer may discriminate against him on grounds forbidden by federal law. See *Robinson*, 455 U.S. at 575, 102 S.Ct. at 1234 (collecting cases); see also *County of Calumet*, 686 F.2d at 1249. However, Article 17.2 is just this sort of agreement. It permits the employer to discriminate against employees who bring ADEA actions. Article 17.2 is thus a waiver of the employee's right to be free from retaliatory discrimination, a right guaranteed by federal law. The waiver is therefore invalid.

The Board resists this conclusion by arguing that Article 17.2 should be considered valid because it prevents the unnecessary duplication of decisional resources. The court is sympathetic to the Board's desire to prevent the unnecessary duplication of scarce resources. This argument, however, does not mean the EEOC has not established a prima facie case. To establish a prima facie case for retaliation under Seventh Circuit law, the EEOC need only allege, as it has, that an employee filed an ADEA action, that adverse employment consequences followed, and that there was a causal link (Article 17.2) between the invocation of ADEA rights and the adverse reaction. The Board's contention that the adverse employment consequences (here, the terminated grievance procedure) were motivated by a desire to conserve resources rather than by a desire to retaliate against those who filed ADEA actions, appears to be an affirmative defense. Whether this affirmative justification is legally and factually sufficient to serve as a "legitimate, nondiscriminatory reason" for the Board's actions is a question the court need not reach on a motion to dismiss. There has been no record developed at this point showing that in fact failure to terminate a grievance would create a duplication of

efforts. Indeed, there appears to be a significant dispute on this point. For example, the EEOC has suggested that Mr. Lewis' grievance claim and his ADEA action are not parallel. The grievance was a claim that the Board failed to adhere to the University's procedure for granting tenure. The ADEA claim, of course, is a claim of age discrimination. Moreover, there may be other differences in the two proceedings such as burdens of proof and possibilities for relief, that make the Board's protests of duplication less persuasive.

Not only is the factual sufficiency of the duplication justification in dispute, but its legal sufficiency is also in doubt. First, this type of justification does not actually rebut the EEOC's claim that the Board has discriminated against those employees who exercise their EEOC rights. Rather, it is an assertion that this sort of non-malicious discrimination ought to be acceptable. It is unclear whether § 4(d) regards this sort of discrimination as acceptable, even if it saves the employer and the union scarce resources. Presumably, the legislative judgment behind § 4(d) is that any discrimination against an employee who exercises his ADEA rights may so deter the exercise of those important rights that it is worth prohibiting that sort of discrimination. *Cf. Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir.1969) (describing purpose behind retaliation provision of Title VII). Second, the Supreme Court in *Alexander* seemed to expressly contemplate that duplication of decisional efforts would be an acceptable consequence of its holding in that case. The Court observed that "legislative enactments in this area [of civil rights] have long evinced

a general intent to accord parallel or overlapping remedies against discrimination." *Alexander*, 415 U.S. at 47, 94 S.Ct. at 1019. This led the Court to conclude:

> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.

Id. at 59-60, 94 S.Ct. at 1025. Thus, this court has its doubts as to whether the Board's desire to avoid duplicative efforts, even if factually supportable, is a valid justification for treating employees differently simply on account of their decision to exercise their employment discrimination rights.

Finally, the board brings to the court's attention one case which, the Board maintains, demonstrates that clauses like Article 17.2 do not violate federal law. *Board of Higher Education v. Professional Staff Congress/CUNY*, 80 Misc.2d 297, 362 N.Y. S.2d 985 (N.Y.Sup.Ct.1975), appears to be the only reported case which squarely addresses the issue in this case. There, the New York Supreme Court held that a collective bargaining agreement provision which terminated an employee's grievance when the employee filed an employment discrimination action in court was enforceable and valid. The New York court reasoned that the agreement fully protected all of the employees' statutory rights, and that was all that *Alexander* required. The agreement did waive an employee's right to arbitrate, but this was considered a right related

to collective activity, and not an individual right to which an employee was statutorily entitled. Therefore, the court concluded, the right could be waived.

This court cannot accept the reasoning of *CUNY*. It is true that in general the right to arbitrate is a right that is acquired by, and therefore is related to, collective activity. But the right to be free from discrimination based on one's exercise of federal civil rights is itself an individual right guaranteed by federal statute. Therefore, a term of a collective bargaining agreement which forfeits an employee's right to arbitration just because he has brought a federal discrimination suit is itself a violation of federal law. Thus, contrary to the reasoning of *CUNY*, the CBA does *not* protect all of the employees' statutory rights. Rather, it contains an agreement permitting the employer to discriminate against an employee on the basis of an employee's exercise of his federal rights. Since an employee may not, through collective bargaining, validly agree to a violation of his federal rights, including his rights not to be retaliated against, Article 17.2 as described in the complaint may be considered invalid.

Furthermore, the remarks of the Seventh Circuit, which of course carry much greater weight here than the New York Supreme Court, confirm this court's analysis. *Mozee v. Jeffboat, Inc.*, 746 F.2d 365 (7th Cir.1984), a case which neither party cites, involved the issue of whether the plaintiffs had been retaliated against for their participation in "Black Days," which was a series of protests against Jeffboat's allegedly discriminatory practices. The district court found no retaliatory motive in the actions Jeffboat took against the plaintiffs, reasoning that Jeffboat treated the plaintiffs' absenteeism and tardiness on

"Black Days" as the terms of the applicable collective bargaining agreement so prescribed. *Id.* at 373. In rejecting this finding and ordering a remand on the issue of whether the protests were "protected activity," the Seventh Circuit issued the following instruction: "Whether the retaliatory action taken by the employer was authorized by the collective bargaining agreement would not appear to be dispositive, or even highly relevant [to the question of whether the retaliation was unlawful]." This instruction, although arguably dictum, suggests that the question of whether employer action is retaliatory is not answered by reference to the terms of a collective bargaining agreement. As already explained by the court, action which is otherwise illegal (such as retaliation) is not automatically deemed legal because authorized by a collective bargaining agreement. It is legal only if the actions authorized by the agreement are motivated by legitimate, nondiscriminatory reasons, an issue which the court need not and does not reach here. Therefore, the EEOC's claim that Article 17.2 violates the ADEA must survive the Board's motion to dismiss.

Conclusion

The Board's motion to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) is denied.

It is so ordered.

No. 91-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1895

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief, *Amicus Curiae*. Letters of consent on behalf of Petitioner, the Board of Governors, and Respondent, the Equal Employment Opportunity Commission (EEOC), have been filed with the Clerk of the Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its mem-

bership comprises a broad segment of the employer community in the United States, including over 260 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, aspects of EEO policies and requirements that apply to the employer-employee relationship.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and other various federal orders and regulations pertaining to nondiscriminatory employment practices and equal opportunity policies. In addition, as employers, many of EEAC's members maintain in-house dispute resolution procedures, including many that are products of the collective bargaining process.

In this case, the court below held that a collectively-bargained provision that made disputes non-arbitrable where employees sought administrative or judicial relief violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* As potential respondents to charges of discrimination pursuant to ADEA and other employment statutes, EEAC's members are concerned that the decision below may expose them to liability if, by collective bargaining or otherwise, they establish dispute resolution procedures that exclude from arbitration claims which a complaining party seeks to have resolved in a parallel administrative or judicial forum. Thus, EEAC members have a direct

interest in the issues presented for the Court's consideration in this case.

Because of its interest in the application of the nation's employment laws, EEAC has filed over 300 briefs as *amicus curiae* before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated as *amicus curiae* in cases involving the proper relationship between grievance and arbitration procedures and federal administrative and judicial procedures. *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984); and *International Union of Elec. Workers, Local 790 v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

Because of its experience with these issues, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to this case. EEAC's brief brings matter to the attention of the Court that has not already been provided by the party briefs.

STATEMENT OF THE CASE

The collective bargaining agreement at issue was negotiated between the Board of Governors of State Colleges and Universities (hereinafter "the Board") and the University Professionals of Illinois (hereinafter "the Union"). (Pet. App. 2-3).[1] The Agreement contains the following provision:

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[1] Citations to the Petitioner's Appendix, including those to the decision below, are designated as Pet. App. ——.

Article 17.2

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

(Pet. App. 3).

In 1984, Professor Raymond Lewis filed a grievance with the Union, alleging that the University president's failure to recommend him for tenure was in violation of University procedures. (Pet. App. 4). An arbitration hearing to resolve Professor Lewis' grievance was scheduled for May 20, 1985. *Id.* On May 14, 1985, Professor Lewis filed a charge of age discrimination with the EEOC based on the same tenure decision. *Id.*

Pursuant to Article 17.2 of the collective bargaining agreement, the Board declined to proceed further with the arbitration procedure. *Id.* Thereafter, the EEOC brought this action against the Board, alleging that its policy, embodied in Article 17.2, violated the non-retaliation provision of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.* (Pet. App. 5).

The trial court concluded that Article 17.2 was valid in the absence of evidence that the provision was adopted with intent to retaliate and granted summary judgment for the Board. (Pet. App. 20). The Court of Appeals for the Seventh Circuit reversed. (Pet. App. 17). Declaring that the motivation of the employer is irrelevant to a claim of retaliation the

Seventh Circuit remanded the case, ordering injunctive relief in favor of the EEOC. (Pet. App. 17).

Judge Manion, although concurring in the opinion of the court, recognized the injustice the decision would produce.

> [T]he advantage of the grievance procedure . . . was that a just result could be achieved without literally making every employment dispute a federal case. This procedure would be a much less expensive and probably more efficient method to resolve disputes . . . the EEOC's approach will eliminate the contractual grievance procedure as a viable option for a Union member to use as an alternative means to resolve a dispute.

(Pet. App. 18-19).

SUMMARY OF REASONS FOR GRANTING THE WRIT

It makes no practical sense to require that a single employment dispute be processed simultaneously through two procedures. Recognizing this, many employers, independently or through collective bargaining, have structured workplace dispute resolution procedures so that they can be suspended or discontinued if the complaining party elects to pursue the matter in another forum. This spares the parties unnecessary expense and duplication of effort and eliminates the prospect of conflicting results.

Placing such practical limitations on the use of an internal dispute resolution procedure in no way retaliates or discriminates against employees who choose to file charges with the EEOC. It simply affords all employees an internal procedure that can be used whenever it has not been rendered redundant by the initiation of proceedings in a parallel forum.

This accommodation is particularly appropriate in cases involving claims of employment discrimination in light of this Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), holding that arbitration decisions cannot preclude relief under federal anti-discrimination laws. Given those holdings, an employer may reasonably conclude that it is pointless to proceed with arbitration of an issue that has been made the subject of an EEOC charge or court complaint, because arbitration in such circumstances cannot provide what many would view as an essential ingredient of effective dispute resolution—*i.e.*, finality.

The court of appeals' decision in this case, however, denies employers and unions the option of agreeing to limit an internal arbitration system to complaints that have not been made the subject of external agency or court proceedings. In doing so, the Seventh Circuit's reasoning effectively converts the internal dispute resolution procedure the parties negotiated from the *alternative* procedure they envisioned to a *duplicative* one that must be carried out even when potentially dispositive, parallel proceedings are underway. Thus, the decision below undermines the basic principle of the *Steelworkers Trilogy* that it is up to the parties to decide what types of claims they wish to submit to arbitration, and under what circumstances.

As Judge Manion noted in his concurrence below, if an employer can be compelled by the risk of liability under an anti-discrimination statute to continue with a dispute resolution hearing even after the employee has sought redress from the EEOC or in court, many

employers may opt to forgo making alternative forums available at all. (Pet. App. 19.) Thus, if allowed to stand, the Seventh Circuit's decision will thwart the development and use of alternative dispute resolution in the employment context. The decision below thus raises important issues in the administration of the federal anti-discrimination statutes that only this Court can now resolve.

Moreover, this case presents an opportunity for the Court to provide much-needed further guidance concerning issues addressed last term in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991). By appearing to encourage greater use of arbitration for the resolution of employment discrimination issues without overruling or expressly modifying *Gardner-Denver* and its progeny, the *Gilmer* decision sent mixed signals to employers about the extent to which arbitration or other dispute resolution procedures may provide viable alternatives to administrative and judicial procedures. Many employers now are very interested in offering employees the option of agreeing voluntarily to the use of alternative dispute resolution procedures. If widely adopted, such procedures could greatly reduce the volume of employment discrimination litigation in the courts. Efforts to develop such programs, however, have been hampered by remaining doubts and uncertainties concerning their efficacy in the wake of *Gilmer*. Many of the questions left unanswered in *Gilmer* could be addressed in the context of this case. For all of these reasons, the writ should be granted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S REASONING IN *ALEXANDER v. GARDNER-DENVER* BY PENALIZING AN EMPLOYER FOR PROVIDING EMPLOYEES WITH AN ALTERNATIVE DISPUTE RESOLUTION PROCEDURE DESIGNED TO COMPLEMENT AND PRESERVE, RATHER THAN OVERLAP AND POTENTIALLY CONFLICT WITH, STATUTORY ENFORCEMENT PROCEDURES.

A. The Seventh Circuit's Rule Creates a "Catch 22" for Employers Who Seek to Afford Employees Practical Alternatives to Statutory Enforcement Procedures.

In *Alexander v. Gardner Denver Co.*, this Court held that Congress intended federal courts to exercise final responsibility for enforcing the employment discrimination provisions of Title VII of the Civil Rights Act of 1964, and that arbitration pursuant to a collective bargaining agreement could not preclude an individual's recourse to the courts for resolution of Title VII rights. 415 U.S. at 56. Similarly, in *McDonald v. City of West Branch*, this Court held that an arbitrator's award could not preclude a claim for judicial relief under 42 U.S.C. § 1983. 466 U.S. 284 (1984.) In the case at bar, however, the Seventh Circuit held that a grievance and arbitration procedure designed to yield to statutorily-created administrative or judicial procedures whenever they have been invoked by a complaining party is retaliatory and unlawful. (Pet. App. 16-17).

Taken together, these decisions create a practical dilemma for employers who wish to make arbitration or other internal dispute resolution procedures available to employees as an alternative to statutory en-

forcement proceedings. Under the Seventh Circuit's decision, if an employer provides such internal procedures at all, it must allow employees who invoke them to pursue their claims through those procedures all the way to completion, even when the same claims have been made the subject of statutory proceedings. Yet, under this Court's decisions in *Gardner-Denver* and *McDonald*, arbitration or other internal procedures cannot produce a dispositive resolution of a claim involving issues of discrimination in such circumstances.

Thus, employers in the Seventh Circuit are placed in the untenable position of being compelled, upon pain of liability under federal anti-discrimination statutes, to process complaints through internal procedures that have been rendered both duplicative and potentially inconclusive by reason of parallel statutory proceedings. And since the EEOC also subscribes to the Seventh Circuit's reasoning, the same dilemma will face employers throughout the nation unless this Court grants the writ and overturns the decision below.

"Alternative dispute resolution" (ADR) will be rendered a misnomer if this decision stands. An employer cannot offer arbitration as an *alternative* to EEOC or court procedures, but only as an additional, overlapping means of pursuing a complaint. The irony of this dilemma is that, under the reasoning of the Seventh Circuit and the EEOC, it is the employer's deference to the statutorily-prescribed enforcement procedure that places the employer in violation of the anti-retaliation provisions of the very statute whose procedures the employer was trying to preserve.

To be sure, some employers and unions may conclude that it is worthwhile to proceed with the processing of grievances through arbitration even though the issues involved have been made the subject of parallel statutory proceedings. For example, the discrimination issues may be closely intertwined with contractual issues that can be resolved only through arbitration. Or the parties may decide to proceed in the hope that an arbitrator's decision, although not preclusive, may be given substantial evidentiary weight in any subsequent judicial proceedings involving the same matter. *See Alexander v. Gardner-Denver*, 415 U.S. at 60 n.21.

In many other instances, however, it may reasonably be concluded that there will be nothing to be gained by continuing to process a case through an internal complaint procedure after external proceedings have been launched. Thus, it is entirely logical and proper for employers and unions to agree, as did the parties in the case at bar, that when statutory charges of discrimination have been filed, internal procedures will be suspended or terminated and the matter will be left to the statutorily-prescribed administrative and judicial processes for resolution.

B. The Decision Below Creates a Strong Disincentive to the Use of Grievance and Arbitration Procedures to Resolve Employment Disputes, and Thus Will Seriously Burden the EEOC and the Courts by Requiring Duplicative Forums.

To say that the Seventh Circuit's decision in this case provides "no incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum" (Pet. App. 19) is a monumental understatement. The decision provides a powerful *disincentive*

to any employer to agree to provide dispute resolution procedures through which employees could raise any issue that might also be made the subject of a charge under one or more anti-discrimination laws. For to do so would almost certainly invite substantial expenditures of time and money to process complaints through a procedure which, under the Seventh Circuit's ruling, could not be suspended or terminated until it had run its full course, and yet could not produce a dispositive resolution of the issues.

Moreover, the availability of dual forums, with different procedural requirements and factfinders, to resolve disputes based on the same or similar facts will surely result in inconsistent rulings in many cases. If the Seventh Circuit's decision in this case is allowed to stand, the parties to such actions will then be forced to litigate the question of which results should be carried out and implemented.

Thus, if, as the Seventh Circuit and the EEOC reason, employers who offer arbitration procedures will face liability for retaliation if they do not allow the use of such procedures for matters being pursued simultaneously through statutory procedures, it may fairly be predicted that most employers will opt not to make such in-house procedures available at all.

This unfortunate result was correctly foreseen by the concurring judge in this case:

> [T]he EEOC's approach will eliminate the contractual grievance procedure as a viable option for a Union member to use as an alternative means to resolve a dispute. Without Article 17.2, the [employer] has no incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum. As it is, the collective

> bargaining agreement would offer an incentive to both sides to resolve the issue quickly, before statutes of limitations or other time limits expire. If the grievance procedure wasn't working, the Union member could turn to the courts (or some other form of arbitration), thus overriding the grievance procedure. Now, the Union member will be permitted to operate in two forums, and presumably take the best deal. But the [employer] may see no benefit in doubling its exposure and adding to the costs of its administrative and legal defense. Thus, [the employer] could conclude that if court action must be an alternative, it will be the only alternative. It seems to me that this rigid result was not really the goal of our federal laws against discrimination. (Pet. App. 19).

Given the rate at which employment discrimination cases are contributing to the rapidly growing caseload problems of the federal judiciary,[2] and the valuable role that grievance and arbitration procedures could play in helping to alleviate those problems, to condone such a result would be irresponsible. These compelling public policy considerations add further support to the arguments for granting the writ and reversing the decision of the Seventh Circuit in this case.

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[2] The Federal Courts Study Committee observed in a report published two years ago that the number of employment discrimination cases filed in the federal courts had already increased by over *two thousand percent* since 1969. Report of the Federal Courts Study Committee at 61 (April 2, 1990). Given the passage of the Civil Rights Act of 1991, and the impending July 26, 1992, effective date of the Americans with Disabilities Act, we can anticipate a further substantial increase in the amount of litigation in the federal courts.

II. THE SEVENTH CIRCUIT'S DECISION IS SQUARELY IN CONFLICT WITH THE LESSONS OF THE *STEELWORKERS TRILOGY*: THE SCOPE OF ARBITRATION IS A MATTER OF CONTRACT AND CANNOT BE ALTERED ABSENT AGREEMENT OF THE PARTIES.

A. The Court of Appeals' Decision Seriously Undermines the Fundamental Principle that the Parties to a Collective Bargaining Contract Must Consent to the Terms of the Contract.

The teachings of the *Steelworkers Trilogy*, three decisions in which this Court delineated and underscored the importance of grievance arbitration in the collective bargaining arena, indicate that arbitration is a consensual arrangement between the parties and that the parties must negotiate and agree which disputes will be submitted to grievance arbitration.

In *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 564-566 (1960), an employer refused to arbitrate a grievance, arguing that the dispute was not arbitrable under the collective bargaining agreement. After examining the content of the collective bargaining agreement that the parties had negotiated, Justice Douglas, writing for the Court, indicated that arbitration should have been ordered because "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." *Id.* at 567.

In a dispute over the "contracting out" provisions of a collective bargaining agreement, this Court again looked to the agreement that was negotiated between the parties and ordered the matter to proceed to arbitration. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Justice Douglas, again speaking for the Court,

wrote: "*Apart from matters that the parties specifically exclude*, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration of the collective agreement." *Id.* at 581 (*emphasis added*). Emphasizing the consensual nature of an arbitral process, this Court stated that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 582.

The last *Steelworkers* case in the trilogy addressed the issue of judicial review of the arbitrator's award. In *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960), this Court again emphasized that the parties' contractual agreement was the defining event, holding that the parties had contracted for the arbitrator's judgment and that the courts were not to reject that judgment merely because they disagreed with the interpretation of the arbitrator.

The Seventh Circuit's decision in this case completely ignores the fact that the parties have agreed, through the collective bargaining process, not to arbitrate discrimination claims where charges involving the same subject matter have been formally initiated in an administrative or judicial forum. In essence, the parties have deemed these disputes to be non-arbitrable. Because the Seventh Circuit's decision squarely conflicts with the longstanding and venerable principles articulated in the *Steelworkers Trilogy*, employers who are parties to such collectively-bargained agreements in the Seventh Circuit face a real quandary as to the extent to which they may rely upon those agreements' terms to govern the scope of their arbitration rights and obligations.

In *AT & T Technologies v. Communication Workers of Am.*, 475 U.S. 643 (1986), this Court recently re-emphasized that the consensual agreement negotiated between the parties is the anchor in the collective bargaining arena. Similarly, in *Litton Financial Printing v. N.L.R.B.*, a post-contract expiration case, this Court again stated "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration *only if he has contracted to do so.*" 111 S.Ct. 2215, 2222 (1991) (*citing, Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)) (*emphasis added*). Thus, this Court has consistently held that arbitration is a matter of consent and that it will not be imposed upon parties beyond the scope of their agreement.[3]

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[3] The lower courts have followed this Court's guidance. For instance, the parties to a collectively-bargained contract may agree that the question of arbitrability may be determined by an arbitrator. *Pipe Trades Council, Local 159 v. Underground Cont. Assoc.*, 835 F.2d 1275 (9th Cir. 1987); *Montgomery Mailers' Union 127 v. Advertiser Co.*, 827 F.2d 709 (11th Cir. 1987). They also may agree on time limitations and other procedural requirements. *Goss Golden West Sheet Metal v. Sheet Metal Workers, Local 104*, 933 F.2d 759 (9th Cir. 1991). Provisions requiring parties to a collectively-bargained contract to turn over "any and all records reasonably necessary" for an audit under the agreement may be included, *T.C. Baer, Inc. v. Iron Workers Local Union No. 580*, 813 F.2d 562 (2d Cir. 1987), as well as the issue of whether an arbitrator may be bound by the decision of a predecessor arbitrator. *Hotel Ass'n of Washington, D.C. v. Hotel and Restaurant Employees Union Local 25*, No. 91-5112, 1992 U.S. App. LEXIS 7898 (D.C. Cir.). Indeed, this Court has intimated that the parties to a collective bargaining contract may even designate in the contract the relevant "event" for purposes of a statutory cause of action. *See International Union of Elec. Workers v. Robbins & Myers, Inc., supra.*

A corollary to the principle that the parties' agreement controls the scope of the arbitration is that where the collective bargaining provision establishes a limit on the arbitrator's power to resolve disputes, an arbitrator is confined to the interpretation and application of the agreement. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Thus, pursuant to the parties' agreement, some specific disputes will not be subject to resolution through the grievance and arbitration process. *See Van Waters & Rogers Inc. v. International Bhd. of Teamsters, Local Union 70*, 913 F.2d 736, 740 (9th Cir. 1990) ("[jurisdictional issues] shall not be submitted to arbitration under this agreement . . ."); *New York News Inc. v. Newspaper Guild of New York*, 927 F.2d 82 (2d Cir. 1991) (the dispute at issue did not arise under the "narrow" arbitration clause); *Teamsters Local 315 v. Union Oil Co. of California*, 856 F.2d 1307 (9th Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989) (no agreement to arbitrate employer's authority to determine the medical fitness of an employee to work); and *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709 (1th Cir. 1987) (where agreement is silent, the issue is beyond the scope of the arbitration clause).

B. Under the Seventh Circuit's Holding, the Parties to a Collective Bargaining Agreement No Longer May Designate the Specific Disputes that Are Beyond the Scope of Arbitration.

In this instance, the Seventh Circuit erroneously held that Article 17.2 violated the retaliation prohibition of the ADEA because it incorrectly interpreted the provision as a broad policy conferring arbitrable status on *all* employment disputes, i.e., a "contractual right to a grievance proceeding." (Pet. App. 12).

Under the collective bargaining agreement negotiated between the Board and the Union in this case, there was no contractual right to arbitrate a dispute in which the employee was seeking an administrative or judicial resolution. In Article 17.2, "the parties specifically exclude[d]" from arbitration, disputes in which an administrative or judicial resolution is sought. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. at 581.

As such, if left unaddressed, the Seventh Circuit's decision threatens to undermine employers efforts to craft arbitration systems under the *Steelworkers* cases and add to the confusion that has already been generated by this Court's discussion of arbitration systems in *Alexander v. Gardner-Denver* and *Gilmer*.

III. EVEN IN NON-UNION SETTINGS, THE SEVENTH CIRCUIT'S DECISION IN THIS CASE WILL RESTRICT THE ABILITY OF EMPLOYERS TO USE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES EFFECTIVELY AND WILL THEREBY CREATE A DISINCENTIVE TO THE ADOPTION OF ADR PROCEDURES.

The Seventh Circuit's decision in this case—requiring continuation of a grievance and arbitration procedure even where an employee initiates a parallel administrative action—will have far reaching effects on employers with non-union workforces as well as unionized employers. Propelled by recent decisions of this Court encouraging the use of alternative means of dispute resolution, *see Gilmer v. Interstate/Johnson Lane Corp., supra.; Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), many employers currently are attempting to determine whether to adopt alternative dis-

pute resolution systems to resolve disputes involving the terms and conditions of employment, and issues of employee selection such as hiring, promotion, and discharge.

In endorsing the use of arbitration in these cases, this Court embraced the view that arbitration offers businesses and individuals predictability and efficiency in their relationships. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 638 (1985). In contrast to the concerns expressed in *Gardner-Denver* and its progeny about the adequacy of collectively-bargained arbitration to resolve statutory discrimination claims,[4] this Court more recently has rejected arguments that individual arbitration agreements cannot sufficiently or adequately be used to resolve statutory claims. *Gilmer v. Interstate/ Johnson Lane Corp.*, 111 S. Ct. at 1654.

At the same time, however, *Gilmer* left open the question of whether its holding applied generally to "employment contracts" or is limited to the securities industry. *See* 111 S. Ct. at 1651 n.2. *Gilmer* also left open the degree to which private arbitration systems must duplicate the procedural and remedial schemes of a statute such as the ADEA or Title VII. As in the collective bargaining context, when an EEOC charge is filed, many employers may find it advisable to have the same claims resolved by the EEOC and the courts rather than take the chance that their ADR procedures may not be binding under standards yet to be determined by this Court.

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[4] *See Alexander v. Gardner-Denver*, 45 U.S. at 56-57; *McDonald v. City of West Branch, Mich.*, 466 U.S. at 290-292; and *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742-744 (1981).

Despite these uncertainties, many employers have established ADR procedures for non-union workforces. One important consideration is whether this alternative system will subject employers to a separate forum that may duplicate or conflict with existing statutory procedures. Often, such arbitration or other dispute resolution procedures provide that where employees have initiated a statutory claim in an administrative or judicial forum, those claims should be resolved through the administrative or judicial process and not by an alternate procedure. The Seventh Circuit's decision in this case, however, will prevent employers from doing so. For, although this case involves a grievance and arbitration provision of a collectively-bargained contract, the underlying rationale of the Seventh Circuit's decision and the EEOC's policy would appear equally applicable to non-union alternative dispute resolution procedures.

The decision below, therefore, inevitably will discourage employer attempts to utilize alternative dispute resolution procedures, because it will allow them no way of discontinuing such procedures when duplicative EEOC or court proceedings are begun. Thus, Judge Manion's admonition that employers will have "no incentive to offer a grievance procedure in lieu of seeking a resolution in some other forum" applies as well to an arbitration system adopted outside the collective bargaining context. (Pet. App. 19).

CONCLUSION

In light of the foregoing, EEAC respectfully submits that the petition for writ of certiorari should be granted so that this Court may issue some guidance to employers seeking to use alternative means of dispute resolution and comply with this Court's rulings in *Alexander v. Gardner-Denver*, *Gilmer*, and the *Steelworkers Trilogy*.

Respectfully submitted,

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No. 91-1895

In the Supreme Court of the United States

OCTOBER TERM, 1992

BOARD OF GOVERNORS OF
STATE COLLEGES AND UNIVERSITIES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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17

QUESTION PRESENTED

Whether the court of appeals correctly concluded that a provision in a collective bargaining agreement denying access to the contractual grievance procedure to employees who file charges of age discrimination violates Section 4(d) of the Age Discrimination in Employment Act, 29 U.S.C. 623(d), which makes it unlawful to discriminate against an employee because he "has made a charge" of age discrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1895

BOARD OF GOVERNORS OF
STATE COLLEGES AND UNIVERSITIES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 957 F.2d 424. The opinions of the district court (Pet. App. 20-64) are reported at 665 F. Supp. 630, 706 F. Supp. 1377, and 735 F. Supp. 888.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1992. The petition for a writ of certiorari was filed on May 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the Board of Governors of State Colleges and Universities (Board), is the Illinois agency responsible for managing five state universities. Since 1977, the Board has been a party to a series of collective bargaining agreements with the University Professionals of Illinois (Union), the collective bargaining representative for most of the full-time academic employees at those universities. Each of the collective bargaining agreements has contained an article establishing a three-step grievance procedure leading to binding arbitration. Each agreement has also contained a provision relieving the Board of its obligation to process an employee's grievance if the employee "seeks resolution of the matter in any other forum." That provision, as set forth in Article 17.2 of the agreement in effect at the time of the events giving rise to this suit, reads as follows (Pet. App. 3):

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

The Board stipulated that it understood Article 17.2 to authorize the Board, in its sole discretion, to refuse to entertain or process an employee's grievance if it learns that the employee has also filed a charge or complaint of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission) or a comparable state agency. R. Doc. 139, ¶¶ 23, 29. The Board has not interpreted the provision to require that the "resolution" sought in the other forum involve the same legal theory, the same burdens or standards of proof, or

the same potential relief. On the contrary, the Board has understood that it may invoke the provision whenever a grievant raises in another forum any claim arising from the same basic fact situation. *Id.* ¶ 28.

The Board has invoked Article 17.2 on at least four occasions after learning that a grievant had filed a charge of discrimination. Pet. App. 4-5 & n.2. The application of the provision in Raymond Lewis's case led to this litigation. Lewis, who taught business law at Northeastern Illinois University (UNI), applied for tenure during the 1983-1984 academic year. After UNI's President recommended that the University deny Lewis's application, Lewis filed a grievance alleging that the President's recommendation had been based on an improper interpretation and application of the prescribed evaluation criteria and had been influenced by factors external and irrelevant to the prescribed evaluation process. The Board subsequently accepted the President's recommendation to deny tenure to Lewis. Lewis did not allege age discrimination on his grievance form or at any time during the grievance procedure. Pet. App. 29; R. Doc. 139, ¶¶ 32, 34-37, 39-40.[1]

The processing of Lewis's grievance lasted more than a year. Prior to an arbitration hearing that was scheduled for May 20, 1985, Lewis met several times with EEOC employees and discussed filing an age

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[1] This disparity between the claims raised in the grievance and the claims raised in the charge of discrimination was not unique to Lewis's case. In fact, in none of the other three cases in which the Board invoked Article 17.2 because grievants filed charges alleging discrimination was the grievance based solely on a discrimination claim. To the contrary, each grievance was based primarily on alleged procedural and/or substantive violations of the prescribed tenure evaluation rules. In only one case did the grievance even mention a discrimination claim. R. Doc. 139, ¶¶ 56, 63, 67, and Exhs. 9, 15 & 21.

discrimination charge. R. Doc. 139, ¶ 44. He was reluctant to file a charge because he feared that UNI would invoke Article 17.2 and stop processing his grievance, but he filed an age discrimination charge with the Commission on May 14. Pet. App. 4. UNI did not learn about Lewis's charge until after the arbitration hearing. Upon learning about the charge, the Board invoked Article 17.2 and directed the arbitrator to cease his deliberations and render no decision. *Ibid.* That action prompted the Commission to file this lawsuit.

2. The EEOC alleged that Article 17.2 discriminates on its face against employees who complain about age discrimination, and therefore violates Section 4(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(d). Section 4(d) provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees * * * because such individual * * * has made a charge * * * under this chapter."

The district court issued three opinions. In its first opinion, the court denied the Board's motion to dismiss the EEOC's complaint. The court first noted that "[i]t is undisputed that § 4(d) of the ADEA prohibits an employer from engaging in discrimination against a person who brings an ADEA action" and that this Court's decision in *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 575 (1982), "teaches that an employee may not validly agree, through a collective bargaining agreement, that his employer may discriminate against him on grounds forbidden by federal law." Pet. App. 59-60. The court then concluded that "Article 17.2 is just this sort of agreement" since "[i]t permits the employer to discriminate against employees who bring ADEA actions." *Id.* at 60.

The EEOC then moved for summary judgment, but a different district court judge denied the motion. Although the new judge agreed that Article 17.2 "is

'discriminatory on its face,'" Pet. App. 42 n.9, quoting *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985), the court felt constrained to follow a statement in *Rose* v. *Hearst Magazines Division*, 814 F.2d 491 (7th Cir. 1987). In *Rose*, a jury found in a special verdict that an employer had retaliated against an employee but had not acted willfully. *Id.* at 493. The Seventh Circuit held that under the facts of that case the special verdict answers were inconsistent, stating: "If [the employer] acted in good faith, it cannot be logically held to have retaliated." *Ibid.* Based on that statement, the district court in this case, "with some reluctance," agreed with the Board's contention "that good faith is a sufficient affirmative defense to a charge of retaliation." Pet. App. 42-43.

In its third opinion, the district court concluded that "[t]he Board has produced facts which establish that it adopted Article 17.2 in order to avoid inconsistent results and to save the time, money and effort resulting from litigating in two forums simultaneously." Pet. App. 26. The court then granted summary judgment in favor of the Board. *Id.* at 27.

3. The court of appeals reversed. Pet. App. 1-19. It noted that "Section 4(d) explicitly prohibits discrimination against employees who engage in protected activity," such as filing complaints alleging age discrimination. *Id.* at 7. "Notably," the court added, "Congress chose not to enact any affirmative defenses to a charge of retaliation, * * * and did not provide an exception to Section 4(d) when such discrimination would be rational or financially prudent." Pet. App. 8. "If the Board wants to lobby for a benign discrimination exception to Section 4(d)," the court concluded, "its appeal would be appropriately directed to Congress rather than this Court." *Id.* at 8-9.

The court went on to note that this case was not an individual disparate treatment case, but involved the Board's *policy*. Pet. App. 10-11. The court recognized that a number of other courts have held that "[i]n discriminatory policy cases the employer's reasons for adopting the challenged policy are irrelevant to the policy's legality." *Id.* at 11. The court held that "an employer's alleged good faith is irrelevant" in a retaliatory policy case as well as in a discriminatory policy case. *Id.* at 12.

The court of appeals then turned to the challenged contractual provision. "Article 17.2," the court stated, "authorizes the Board to take an adverse employment action (termination of the in-house grievance proceeding) for the sole reason that the employee has engaged in protected activity (filing an ADEA claim)." Pet. App. 12. It therefore violates Section 4(d): "The Board may not deny grievance proceedings on the basis that employees have filed protected ADEA claims." Pet. App. 14.

That conclusion is not affected, the court added, by the Board's argument that it is not required to provide grievance proceedings to its employees at all. If the Board chooses to provide grievance rights, the Court held, those rights "may not be doled out in a discriminatory fashion." Pet. App. 13, quoting *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984). Moreover, while it is true that Article 17.2 allows the Board to cancel grievance proceedings for employees who have filed various sorts of complaints, not just age discrimination claims, the Seventh Circuit considered that fact irrelevant. "Were we to adopt the Board's argument that a policy imposing adverse treatment on all members of a protected class was rendered non-discriminatory by the inclusion of some members outside the protected class," the court explained, "employers could consistently employ discriminatory criteria as long as they were careful

to draw their discriminatory lines broadly enough to include members of a non-protected class." Pet. App. 16.[2]

ARGUMENT

The decision of the court of appeals is correct and further review by this Court is unwarranted.

1. The Board first argues that this Court should grant its petition for a writ of certiorari because the Seventh Circuit's judgment requires employers to provide "duplicative forums" for discrimination disputes. Pet. 6-10. This argument is flawed both factually and legally.

As an initial matter, although the Board asks this Court to address the propriety of "duplicative forums," the contractual forum that the Board withdrew from grievants filing discrimination charges was not duplicative. During the 12-year period covered by the parties' factual stipulations, there were four instances in which the Board learned that a grievant had filed a charge of discrimination. In each of those cases the grievance was based principally if not solely on allegations that the Board had failed to comply in some way with its tenure evaluation regulations. One of the grievants mentioned a discrimination claim as one of several claims in his grievance, but as far as appears from the record, none of the others raised discrimination claims in their grievances at all.

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[2] Judge Manion concurred, "albeit reluctantly," because the court of appeals' decision permits employees "to operate in two forums." Pet. App. 18-19. But since Section 4(d) of the ADEA prohibits discrimination against employees who file age discrimination claims and Article 17.2 provides that an employee who files an age discrimination claim may lose his right to pursue a grievance, Judge Manion concluded that Article 17.2 was contrary to Section 4(d). He added that "any adjustment will have to be statutory, not with the courts." Pet. App. 19.

Thus, in none of these cases were the two forums genuinely "duplicative." The grievance proceedings primarily addressed whether the tenure decisions were consistent with petitioner's regulations, while the administrative proceedings addressed the employees' statutory discrimination claims. Terminating the grievance proceedings upon learning about the existence of the discrimination claims may have saved the Board money, but it did not serve the Board's purported goal of avoiding duplicative proceedings. See Pet. App. 8 & n.5 (the contractual and statutory proceedings here "involve[d] different claims"). Indeed, this distinction between the types of claims that were addressed in the two forums accentuates the retaliatory nature of the challenged policy. Employees who filed charges lost not merely the right to have their statutory discrimination claims addressed in the grievance proceeding; they lost also the right—a right that similarly situated employees of course retain—to have their *contractual* claims addressed in the grievance proceeding.

But even if Article 17.2 were invoked only when the employee's grievance rested principally or solely on the discrimination claim the employee was raising, the provision would still violate Section 4(d). This Court has repeatedly held that an employee's contractual rights under collective bargaining agreements "are distinct from the employee's statutory * * * rights" under laws like the ADEA. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1656 (1991), citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974). In enacting the principal employment discrimination statutes, Congress meant to supplement rather than supplant rights that employees already possessed under the National Labor Relations Act (NLRA). *Alexander*, 415 U.S. at 48-49 & n.9. Employees are therefore free to pursue their contractual rights in the contractual forum

and their statutory rights in the statutory forum. *Id.* at 48-49, 59-60; *Johnson* v. *Palma*, 931 F.2d 203, 208 (2d Cir. 1991). The union is not permitted to waive the employees' individual statutory rights in the collective bargaining process, *Alexander*, 415 U.S. at 51 (Title VII); *Bartman* v. *Allis-Chalmers Corp.*, 799 F.2d 311, 315 (7th Cir. 1986) (ADEA), cert. denied, 479 U.S. 1092 (1987), nor is the employer permitted to "force an employee to elect either collective bargaining or a statutory remedy." *Johnson*, 931 F.2d at 208.

2. The Board next argues that the court of appeals' decision has created "unwarranted tension" between the NLRA and the ADEA because it infringes unduly on the rights of employers and unions to define the scope and application of their contractual grievance and arbitration provisions. Pet. 10-13. To the extent that such "tension" exists, the Seventh Circuit did not create it in March of 1992; Congress created it in 1967 when it enacted the ADEA. This Court has held that "[t]he terms of any collective-bargaining agreement must comply with federal laws that prohibit discrimination." *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 575 (1982). Thus, it is clear that employers and unions are not free to enter into collective bargaining agreements that violate Section 4(a) of the ADEA—by, for example, granting most employees access to grievance and arbitration procedures but withholding access from employees who are 60 or older. See Pet. 12. All the Seventh Circuit did in this case is clarify that employers and unions are also prohibited from entering into collective bargaining agreements that violate Section 4(d) of the Act.

3. Finally, petitioner argues that review is warranted to resolve a conflict in the circuits. Pet. 14-17. But petitioner does not contend that there is a conflict with respect to whether employers may exclude from grievance

proceedings employees who bring discrimination claims. In fact, there is no conflict—the other courts of appeals to address the issue have agreed with the Seventh Circuit that such a policy violates the ADEA. *Johnson* v. *Palma*, 931 F.2d at 208 (company's policy of terminating grievances of employees who file discrimination complaints "abridges the [employees'] statutory rights"); see *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085, 1089 (5th Cir. 1987) ("[c]learly if [the company] stopped providing [the employee] benefits to which he was otherwise entitled simply because he filed a charge, the company would be guilty of retaliation").[3]

Rather than allege a direct conflict with respect to whether a policy of excluding employees who file discrimination claims from grievance proceedings is

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[3] Petitioner states that "such exclusions [from grievance procedures] have been found lawful in some other jurisdictions — although not in another United States Court of Appeals." Pet. 9, citing three trial court decisions. Of course, review by this Court normally would not be warranted on account of a disagreement between a court of appeals and a trial court. In any event, petitioner's claim that three courts have found such provisions lawful does not survive close scrutiny. In two of those cases the employer's policy does not appear to have been challenged as unlawful at all. *Kumar* v. *Board of Trustees*, 566 F. Supp. 1299, 1301, 1319, 1327 (D. Mass. 1983), rev'd on other grounds, 774 F.2d 1 (1st Cir. 1985), cert. denied, 475 U.S. 1097 (1986); *Gold* v. *Gallaudet College*, 630 F. Supp. 1176, 1183, 1189 (D.D.C. 1986). In the third case, *Board of Higher Education* v. *Professional Staff Congress/CUNY*, 362 N.Y.S.2d 985, 987-989 (Sup. Ct. 1975), an employer's policy was challenged, but the statutory basis for the challenge is not apparent from the court's decision. Thus, although in our view the policy at issue appears to be contrary to Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), which is similar to Section 4(d) of the ADEA, the court did not address Section 704(a), and it is not clear from the court's opinion whether the statute was called to the court's attention.

contrary to Section 4(d) of the ADEA, petitioner alleges a more general conflict with the Fifth Circuit's decision in *EEOC* v. *J.M. Huber Corp.*, 927 F.2d 1322, reh'g denied, 942 F.2d 930 (1991). At issue in *Huber* was the company's policy of withholding distribution of a terminated employee's pension benefits if the employee challenged the termination and sought reinstatement. The company claimed that it adopted that policy to protect the qualified tax status of its pension plans under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* 927 F.2d at 1324. On the assumption that "the tax qualified status of the benefit plan could be jeopardized by distributing plan benefits to a terminated employee while the validity of the employee's termination is unsettled and a realistic possibility of reinstatement remains," *id.* at 1330, the court of appeals reversed the district court's grant of summary judgment in favor of the EEOC.

While we do not agree with everything the Fifth Circuit had to say in its opinion in *Huber*, that case is very different from this case. The court, in effect, assumed that the distribution of pension plan assets to a former employee who might be reinstated would be contrary to ERISA and would result in disqualification of the employer's pension plans, a drastic result. Thus, the case appeared to present a conflict between two federal statutes—the ADEA and ERISA—one of which required a distribution of pension plan assets while the other allegedly penalized such a distribution. Whether compliance with another federal law excuses a policy that would otherwise violate Section 4(d) of the ADEA is a question that would depend on the specifics of the federal law at issue. But this case presents no such issue, since the policy embodied in Article 17.2 of the collective bargaining agreement is not compelled by any law, federal or otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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